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U.S. Actions to Freeze Assets of Terrorism: Manifest and Latent Implications for Latin America

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UNIVERSAL RIGHTS OR A UNIVERSE UNTO ITSELF? INDIGENOUS PEOPLES' HUMAN RIGHTS AND THE WORLD BANK'S DRAFT OPERATIONAL POLICY 4.10 ON INDIGENOUS PEOPLES

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INTRODUCTION

It is apparent that multilateral institutions like the Bank, the IMF and the WTO need to be continuously reminded of the human rights obligations established by international law. To borrow from Asbjørn Eide, these comprise the obligations to “respect,” “protect” and “fulfill.” More importantly, [multilateral institutions] must also respect and apply those standards to their own internal processes of policy formulation, or else those obligations cease to be of any import.¹

The International Monetary Fund and the World Bank often have a decisive say in determining a State's economic policies and priorities. The

1. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, HUMAN RIGHTS AS THE PRIMARY OBJECTIVE OF INTERNATIONAL TRADE, INVESTMENT AND FINANCE POLICY AND PRACTICE; WORKING PAPER SUBMITTED BY J. OLOKA-ONYANGO AND DEEPIKA UDAGAMA, IN ACCORDANCE WITH SUB-COMMISSION RESOLUTION 1998/12, para. 36, U.N. Doc. E/CN.4/Sub.2/1999/11 (1999) [hereinafter WORKING PAPER].

human consequences of Bank and Fund policies can be far-reaching. Yet the impression is that sufficient account has not been taken of the consequences and the human rights implications of their actions, that these are regarded as someone else's responsibility, not the institutions' or the economists'. The dialogue with the Bretton Woods institutions and the World Trade Organization must, therefore, be intensified. All of the programs and policies pursued by the IMF and the World Bank should be consistent with international human rights standards.²

A. THE WORLD BANK AND HUMAN RIGHTS: INTERNATIONAL CONCERN

As the above quotes indicate, the relationship between the World Bank's ("Bank") policies and operations and international human rights standards is the subject of high level international scrutiny and concern. World leaders³ and institutions such as the European Parliament have made calls to amend the Bank's Articles of Agreement to ensure that human rights issues are addressed.⁴ The perception that the Bank's policies and practices, both directly and indirectly, are at odds with human rights is widespread, and in many respects, justified. This perception is not new and dates back to the late 1960s and early 1970s.⁵

While the Bank widely publicizes what it perceives to be its contribution to the realization of economic, social, and cultural rights, it openly disregards a whole range of rights that it determines to be "political" and, therefore, beyond the mandate of its Articles of

2. Mary Robinson, On the Eve of the Twenty-First Century, Statement on the Fiftieth Anniversary of the Universal Declaration of Human Rights (Dec. 7, 1998), at <http://www.cyberhomepage.com/50th-a.html>.

3. See *Blair Calls for Urgent Reform of IMF*, *World Bank*, BUS. DAY, Sept. 22, 1998, at 1 (discussing British Prime Minister Tony Blair's request that the IMF and World Bank's founding treaties be rewritten).

4. See J. Verspaget, *Report on the Activities of the Bretton Woods Institutions (World Bank and International Monetary Fund)*, Eur. Parl. Ass., Doc. No. 7256 (1995).

5. See James Gathii, *Human Rights, the World Bank and the Washington Consensus: 1949-1999*, 94 AM. SOC'Y OF INT'L L. 144 (2000) (describing claims that the World Bank's support for the international bill of human rights was insufficient, given the organization's influence in the international arena).

Agreement.⁶ Not only is this distinction arbitrary and inconsistently applied, but it also runs counter to mainstream thought about the nature of human rights and attendant international obligations. Moreover, while the Bank in some cases plays a positive role in promoting economic, social, and cultural rights, it has never undertaken a systematic evaluation of the impact of its operations on human rights in order to support its claims. Ample evidence demonstrates that in many cases Bank policies and operations have had a negative impact on not only civil and political rights, but also on the enjoyment of economic, social, and cultural rights.⁷ This has prompted, among others, the U.N. Committee on Economic, Social and Cultural Rights, the intergovernmental body that monitors the U.N. Convention of the same name, to comment on the impact of Bank operations on human rights. In 1990, the Committee stated that:

Development co-operation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of 'development' have subsequently been recognized as ill conceived and even counter-productive in human rights terms. In order to reduce the incidence of such problems, the whole range of issues dealt with in the [Covenant on Economic, Social and Cultural Rights] should, wherever possible and appropriate, be given careful and specific consideration...As a matter of principle, the appropriate United Nations organs and agencies should specifically recognize the intimate relationship which should be established between development activities and efforts to promote respect for human rights in general, and

6. See WORLD BANK, DEVELOPMENT AND HUMAN RIGHTS: THE ROLE OF THE WORLD BANK (1998); UNITED NATIONS, GENERAL ASSEMBLY, THE WORLD BANK AND THE PROMOTION OF HUMAN RIGHTS; SUBMISSION TO THE 1993 VIENNA WORLD CONFERENCE ON HUMAN RIGHTS, U.N. Doc. A/CONF.157/PC/61/Add.19 (1993); Ibrahim Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, 17 DENVER J INT'L LAW & POLICY 39, 43-47 (1988) (providing examples of the Bank's policy against involving itself in political matters).

7. The Bank's own study on its operations involving resettlement provides stark evidence of substantial denials of economic, social and cultural rights. See ENVIRONMENT DEPARTMENT, WORLD BANK, RESETTLEMENT AND DEVELOPMENT: THE BANKWIDE REVIEW OF PROJECTS INVOLVING INVOLUNTARY RESETTLEMENT, 1986-1993 (1996) [hereinafter RESETTLEMENT AND DEVELOPMENT]. Cf. J. Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa*, 26 CAL. W. INT'L L.J. 1, 20-29 (1995) (discussing the negative impact of Bank operations on civil and political, as well as economic, social, and cultural rights in Africa).

economic, social and cultural rights in particular.⁸

And again in 1998:

The Committee calls upon the International Monetary Fund and the World Bank to pay enhanced attention in their activities to respect for economic, social and cultural rights, including through encouraging explicit recognition of these rights, assisting in the identification of country-specific benchmarks to facilitate their promotion, and facilitating the development of appropriate remedies for responding to violations.⁹

The Committee has also begun to systematically question reporting states on whether they account for human rights when casting their votes at the Bank and, in the case of borrowing states, whether they have engaged in a dialogue with the Bank about human rights in their proposed projects and other interactions with the Bank.¹⁰

Similarly, in its Resolution 1998/12, the U.N. Sub-commission on Prevention of Discrimination and Protection of Minorities, as it was known in 1998, stated that it was "convinced of the need to re-emphasize the centrality and primacy of human rights obligations in all areas of governance and development, including international and regional trade, investment and financial policies, agreements and practices."¹¹ Accordingly, this resolution "urge[d] United Nations

8. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INTERNATIONAL TECHNICAL ASSISTANCE MEASURES (ART. 22 OF THE COVENANT); GENERAL COMMENT NO. 2, paras. 7, 8(a), U.N. Doc. E/1990/23 (1990).

9. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, GLOBALIZATION AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS; STATEMENT BY THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, at <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/adc44375895aa10d8025668f003Cc06e?Opendocument> (May 11, 1998).

10. See SIGRUN I. SKOGLY, *THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND INTERNATIONAL MONETARY FUND* 134 (Cavendish Publishing Ltd. 2001).

11. See UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, SUB-COMMISSION ON PREVENTION ON DISCRIMINATION AND PROTECTION OF MINORITIES, *HUMAN RIGHTS AS THE PRIMARY OBJECTIVE OF TRADE, INVESTMENT AND FINANCIAL POLICY*, U.N. Doc. E/CN.4/Sub.2/1998/12 (1998) (expressing the organization's concern over international human rights abuses and resolving to take steps to address that concern in the future).

agencies, including the International Monetary Fund and the World Bank, to at all times be conscious of and respect the human rights obligations of the countries with which they work.”¹² The resolution further authorized a study on human rights and international development, trade, and investment, joining the Sub-commission with the Committee on Economic, Social and Cultural Rights in scrutinizing the impact of the Bank’s operations on human rights.¹³ The Sub-commission and the Commission on Human Rights have also raised concerns about Bank operations in their thematic work, addressing involuntary resettlement, the impact of structural adjustment policies on economic, social and cultural rights, and the right to food.¹⁴

Read together with the statements heading this paper, the preceding quotations highlight three different, although interrelated, aspects of human rights concerns related to the Bank’s work: 1) the Bank’s own internal policies and their relationship to human rights; 2) the human rights impact and implications of the Bank’s operations as related to the obligations of the Bank’s members; and 3) the obliga-

12. *Id.*

13. *See id.* (resolving to prepare a working paper suggesting ways the United Nations can promote consideration of human rights in international trade and investment transactions). The first phase of this study was issued as: HUMAN RIGHTS AS THE PRIMARY OBJECTIVE OF INTERNATIONAL TRADE, INVESTMENT AND FINANCE POLICY AND PRACTICE. *See* WORKING PAPER, *supra* note 1. Oloka-Onyango and Udagama later released GLOBALISATION AND ITS IMPACT ON THE FULL ENJOYMENT OF HUMAN RIGHTS. *See* UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, SUB-COMMISSION ON PROMOTION AND PROTECTION OF HUMAN RIGHTS; PRELIMINARY REPORT SUBMITTED BY J. OLOKA-ONYANGO AND DEEPIKA UDAGAM, IN ACCORDANCE WITH SUB-COMMISSION RESOLUTION 1999/8, U.N. Doc. E/CN.4/sub.2/2000/13 (2000).

14. *See* UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, FORCED EVICTIONS; ANALYTICAL REPORT COMPILED BY THE SECRETARY-GENERAL PURSUANT TO COMMISSION RESOLUTION 1993/77, U.N. Doc. E/CN.4/1994/20 (1994) [hereinafter FORCED EVICTIONS] (identifying structural adjustment policies as one of the leading causes of involuntary resettlement); UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, THE HIGHLY INDEBTED POOR COUNTRIES (HIPC) INITIATIVE: A HUMAN RIGHTS ASSESSMENT OF THE POVERTY REDUCTION STRATEGY PAPERS (PRSP); REPORT SUBMITTED BY MR. FANTU CHERU, INDEPENDENT EXPERT ON THE EFFECTS OF STRUCTURAL ADJUSTMENT POLICIES AND FOREIGN DEBT ON THE FULL ENJOYMENT OF ALL HUMAN RIGHTS, PARTICULARLY ECONOMIC, SOCIAL AND CULTURAL RIGHTS, U.N. Doc. E/CN.4/2001/56 (2001) (describing the inflexibility of the World Bank Highly Indebted Poor Countries Initiative).

tions that the Bank may have to account for human rights in its operational sphere as an institution and subject of international law. Professor Daniel Bradlow defines the former as "institutional" and the latter as "operational" human rights issues.¹⁵ Institutional human rights issues focus "on the responsibilities of the IFIs [International Financial Institutions] to ensure that their own internal operating rules and procedures are consistent with internationally recognized human rights standards;" the operational issues "pertain to the human rights impact of the IFIs' operations in their member states," and focus "on the IFIs' responsibilities for ensuring that the design and implementation of their projects, programs, policies and in-country activities are consistent with internationally recognized human rights standards."¹⁶

B. RIGHTS-BASED APPROACH TO DEVELOPMENT

The increased international scrutiny of the World Bank on human rights grounds coincides with a general trend among multi- and bilateral development actors, including U.N. Specialized Agencies, to adopt a "rights-based approach" to development or to tie their programmatic work to human rights standards.¹⁷ The High Commissioner for Human Rights, for instance, is working with U.N. development agencies to mainstream human rights in their operations.¹⁸ The U.N. Development Program ("U.N.DP") has explicitly adopted a general rights-based approach to development, while others such as the U.N. Children's Fund ("U.N.ICEF") and the U.N. Development Fund for Women ("U.N.IFEM") have tied their programmatic work

15. See Daniel Bradlow, *The World Bank, the IMF and Human Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 47, 51 (1996) (asserting human rights troubles common to international financial institutions).

16. *Id.*

17. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1998) (setting forth the work of the Nobel Prize winning economist from which much of the recent thought about rights-based approaches to development has originated).

18. See UNITED NATIONS, COMMISSION ON HUMAN RIGHTS, OPEN-ENDED WORKING GROUP ON THE RIGHT TO DEVELOPMENT, *THE RIGHT TO DEVELOPMENT; REPORT OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS SUBMITTED IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 54/175*, U.N. Doc. E/CN.4/2000/WG.18/CRP.2 (2000) (describing the efforts of the High Commissioner to organize meetings with other groups).

to the human rights conventions related to their mandates: the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women, respectively.¹⁹

A rights-based approach to development is one that explicitly ties development policies, objectives, projects, and outputs to international human rights standards requiring that development be directed towards fulfilling human rights. Conversely, it is a proactive strategy for converting rights into development goals and standards. For example, health, education, or land reform projects will be informed, framed by, and substantially directed towards fulfilling the procedural and substantive aspects of the associated rights. In essence, this converts development goals and objectives into rights, entitlements, responsibility and accountability. This approach comports with the U.N. Declaration on the Right to Development proclaimed by the U.N. General Assembly in 1986.²⁰ The General Assembly adopted the declaration with only one vote against and eight abstentions.²¹

19. See UNITED NATIONS DEVELOPMENT PROGRAMME, INTEGRATING HUMAN RIGHTS WITH SUSTAINABLE HUMAN DEVELOPMENT; A U.N.DP POLICY DOCUMENT, at <http://magnet.undp.org/Docs/policy5.html> (Jan. 1998); UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2000, at <http://www.undp.org/hdr2000> (June 2000); UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT AND HUMAN RIGHTS: REPORT ON THE OSLO SYMPOSIUM, 2-3 OCTOBER 1998, at <http://www.undp.org/hdro/Oslorepl.html> (Oct. 2, 1998).

20. See UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, THE RIGHT TO DEVELOPMENT; REPORT OF THE INDEPENDENT EXPERT ON THE RIGHT TO DEVELOPMENT, DR. ARJUN SENGUPTA, PURSUANT TO GENERAL ASSEMBLY RESOLUTION 52/175 AND COMMISSION ON HUMAN RIGHTS RESOLUTION E/CN.4/RES/2000/5, para. 19, U.N. Doc. E/CN.4/2000/WG.18/CRP.1 (2000). The report states:

[A] human rights approach to development can be very well seen as human development carried out in a manner fulfilling human rights. Such an approach is specified in the Declaration on the Right to Development and subsequent international resolutions as a participatory, accountable and transparent process with equity in decision making and sharing of the fruits or outcomes of the process as well as maintaining all the civil and political rights. The objectives of development are set up as claims or entitlements of rights-holders which duty-bearers are expected to protect and promote, respecting international human rights standards based on equity and justice.

See *id.*

21. Declaration on the Right to Development, Dec. 4, 1986, U.N. GAOR, 41st

Current discussion on a rights-based approach to development within the U.N. and elsewhere does not focus on the wisdom of such an approach, which appears to be generally accepted, but rather focuses on how it can be implemented. While the Bank has participated in some of the discussions about implementing the right to development, and maintains that its approach to poverty alleviation is aimed at realizing economic, social and cultural rights, the Bank remains conspicuously absent from the larger discussion about adopting a rights-based approach to development.

C. INTERNATIONAL ATTENTION TO INDIGENOUS PEOPLES' HUMAN RIGHTS

The human rights of indigenous peoples have also warranted a high level of international scrutiny and action in recent years, both generally and specifically in connection with the Bank's activities and policies. Indeed, it would be accurate to say that indigenous peoples' rights have become a large and permanent part of the intergovernmental human rights agenda in the past twenty years, during which time international standards have evolved and strengthened considerably. This evolution includes both international standard setting exercises leading to or resulting in formal instruments on indigenous rights,²² incorporation of some of those rights in international instruments on environment and development,²³ and protection

Sess., Annex, U.N. Doc. A/41/53 (1987).

22. See generally, Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (explaining how the developments in international law since 1957 have resulted in the need to adopt new standards regarding the rights of indigenous peoples), at <http://www.unhchr.ch/html/menu3/b/62.htm> (June 27, 1989); UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES; REPORT OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES ON ITS FORTY-SIXTH SESSION, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (1994); Inter-American Commission on Human Rights, Proposed American Declaration on the Rights on Indigenous Peoples, at <http://www.cidh.oas.org/Indigenous.htm> (Feb. 26, 1997). The African Commission on Human and Peoples' Rights recently established a Working Group on Indigenous People in Africa. See *Resolution on the Rights of Indigenous People/Communities in Africa*, African Comm'n on Human & Peoples' Rights, 28th Sess. (Nov. 6, 2000).

23. See Convention on Biological Diversity (demonstrating that the writers of the Convention on Biological Diversity considered the rights of indigenous peo-

of indigenous peoples' rights under human rights instruments of general application.²⁴

These changes at the international level have prompted, and to a lesser extent reflected, a multitude of constitutional, legislative, jurisprudential, and policy changes at the domestic level.²⁵ Taken in its totality, this evolution of juridical thought and practice has led many to conclude that some indigenous rights have attained the status of customary international law, therefore, binding states regardless of whether they have ratified the relevant treaties.²⁶ Professor Siegfried Wiessner, for instance, concludes that state practice and *opinio juris* permit the "identification of specific rules of a customary interna-

ple), at <http://www.biodiv.org/convention/articles.asp> (Aug. 30, 2001); Agenda 21 for Change (explaining how Agenda 21 addressed the roles of indigenous people), at <http://iisd1.iisd.ca/rio+5/agenda/agenda21.htm> (Nov. 10, 2001).

24. See *infra* Part III (discussing the treatment of indigenous rights under instruments of general application). The term "general application" refers to human rights instruments not exclusively or specifically focused on indigenous peoples. *Id.*

25. See UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, INDIGENOUS PEOPLES AND THEIR RELATIONSHIP TO LAND; FINAL WORKING PAPER PREPARED BY THE SPECIAL RAPPORTEUR, MRS. ERICA-IRENE A. DAES, paras. 105-113, U.N. Doc. E/CN.4/Sub.2/2001/21 (2001) (detailing inclusion of indigenous peoples' land rights in nations' constitutional amendments and new legislation).

26. See S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 49-58, 107 (1996) (citing the International Labour Organisation Convention Number 169 as indicative of a trend that extends rights to indigenous peoples through international agreements); Siegfried Wiessner, *The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 127 (1999) (noting the development and crystallization of customary norms protecting indigenous peoples' rights); Raizda Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127 (examining domestic and international mechanisms for establishing an indigenous rights norm); Catherine J. Iorns Magallanes, *International Human Rights and Their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada and New Zealand*, in INDIGENOUS PEOPLES' RIGHTS IN AUSTRALIA, CANADA AND NEW ZEALAND 238 (Paul Havemann ed., 1999) (citing S. James Anaya's statement that "since the 1970s international law has reflected 'a new generation of international consensus on indigenous peoples' rights'"). Anaya goes on to argue that "further significant international legal developments provide evidence that customary international law has accepted the right of cultural self-determination for indigenous peoples and the consequent autonomous control necessary to achieve that." *Id.* at 242-43.

tional law of indigenous peoples."²⁷ These rules relate to several areas.

First, indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life. Second, they hold the right to political, economic, and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own systems of justice. Third, indigenous peoples have a right to demarcation, ownership, development, control, and use of the lands they have traditionally owned or otherwise occupied and used. Fourth, governments are to honor and faithfully observe their treaty commitments to indigenous nations.²⁸

Whether some indigenous rights have attained the status of customary international law is an important issue as it relates to the human rights obligations of the Bank and its Members.²⁹ However, this status, by itself, does not determine the existence of obligations. The jurisprudence of the Human Rights Committee,³⁰ the Committee on the Elimination of All Forms of Racial Discrimination ("CERD"),³¹ the Committee on Economic, Social and Cultural Rights, the Inter-American Commission of Human Rights, and others have all firmly established that indigenous rights and corresponding obligations exist under the general human rights instruments that fall within their respective areas of competence. While the Bank is not party to any of these instruments, its status as a subject of international law and as a member of the U.N. family confers a number of obligations with regard to the rights set forth therein and human rights in general.³²

27. Wiessner, *supra* note 26, at 127.

28. *Id.*

29. See *infra* notes 138-147 and accompanying text (attempting to define the rights of indigenous peoples in relation to the Bank's members).

30. One hundred forty-seven states have ratified the Covenant on Civil and Political Rights as of October 22, 2001. See Status of Ratifications of the Principal International Human Rights Treaties [hereinafter Status of Treaties] (displaying all the signatories to the treaty), at <http://www.unhchr.ch/pdf/report.pdf> (Nov. 10, 2001).

31. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 60 U.N.T.S. 195 [hereinafter CERD]. One hundred fifty-nine states have ratified CERD as of October 22, 2001. See Status of Treaties, *supra* note 30.

32. See *infra* Part II (outlining the Bank's position in the realm of international

The Bank has previously acknowledged that indigenous peoples require special attention, as they are especially vulnerable to negative effects caused by Bank-funded operations.³³ To account for this, the Bank has adopted a number of policy statements that attempt to provide safeguards for indigenous peoples.³⁴ In 1991, for instance, it adopted Operational Directive 4.20 on Indigenous Peoples (“OD 4.20”).³⁵ OD 4.20’s broad objective is, “to ensure that the development process fosters full respect for [indigenous peoples’] dignity, human rights and cultural uniqueness.”³⁶ This statement is repeated in paragraph one of the draft Operational Policy 4.10 on Indigenous Peoples, a revision of OD 4.20.³⁷ In principle then, Bank policies and activities should be informed by, account for and respect Indigenous peoples’ human rights.

This article examines one intersection of human rights issues and World Bank activities: how the Bank’s draft Operational Policy 4.10 on Indigenous Peoples (“OP 4.10”) compares to international human rights standards pertaining to indigenous peoples. This analysis is framed by a larger discussion of whether the Bank has international legal obligations—especially the nature and extent of those obligations—to account for and respect indigenous peoples’ human rights in its policy setting and operational processes. I begin with a brief look at the World Bank’s attitude towards human rights and the role of these rights in the development process.

law, leading to its human rights obligations).

33. See WORLD BANK OPERATIONAL MANUAL, OPERATIONAL DIRECTIVE 4.20 ON INDIGENOUS PEOPLES, para. 3 (Mar. 2001) [hereinafter OD 4.20] (defining the term “indigenous peoples” as those people whose minority status puts them at significant risk in the development process), at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/tocall/0F7D6F3F04DD70398525672C007D08ED?OpenDocument>.

34. See, e.g., *id.* (detailing some of the statements made by the Bank to provide safeguards).

35. *Id.*

36. *Id.* para. 6.

37. See WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICY 4.10, INDIGENOUS PEOPLES, para. 1 (Mar. 2001) [hereinafter OP 4.10], at <http://lnweb18.worldbank.org/essd/fe699bec4e6alef8526a6b0080b5d7?OpenDocument>.

I. DEVELOPMENT AND HUMAN RIGHTS: THE ROLE AND ATTITUDE OF THE WORLD BANK

The Bank has no formal, written policy on human rights, either in terms of the Bank's role, or lack thereof, in promoting and requiring respect for human rights in its operations or internally in terms of its policies. OP 4.20 on Indigenous Peoples remains the only operational policy that explicitly mentions human rights and the Bank has never officially stated its understanding of the term "human rights" in that directive.³⁸ Consequently, attitudes toward human rights must be deduced from the statements of Bank officials, its publications, and practices. From this we can see that the Bank has progressed from outright rejection of human rights in the 1960s to cautious engagement in a few, defined areas. However, this engagement is still qualified by an arbitrary distinction between rights of a political nature and rights related to economic or social well being.

In recent years, the Bank has been more forthcoming about what it perceives its role to be in promoting human rights and the place of human rights in overall development and poverty reduction efforts. In his 1999 Proposal for a Comprehensive Development Framework, for instance, the President of the Bank stated unequivocally that "without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible."³⁹

This statement comports with the review of attitudes among multi- and bilateral development actors conducted by the Development Assistance Committee of the Organization for Economic Co-operation and Development ("OECD").⁴⁰ The OECD review stated that "to achieve sustainable development, it is necessary to address economic

38. See generally OD 4.20, *supra* note 33 (failing to set forth the Bank's understanding of "human rights").

39. Memorandum from James D. Wolfensohn, President of the World Bank, to the Board, Management, and Staff of the World Bank Group, 10 (Jan. 21, 1999) (discussing effective legal and justice system as a necessary part of proposed comprehensive development framework), at <http://www.worldbank.org/cdf/cdf.pdf>.

40. See Organisation for Economic Co-operation and Development, Development Assistance Committee, *On Common Ground: Converging Views on Development and Development Co-operation at the Turn of the Century* (Feb. 2000) (surveying basic international principles of development and sustainable development), at <http://www.worldbank.org/cdf/oncommonground.htm>.

and financial issues on the one hand, with structural, social and human issues, on the other, in a balanced way, thereby integrating the following key elements: . . . good governance and public management, democratic accountability, the protection of human rights and the rule of law.”⁴¹

Similarly, the Copenhagen Declaration on Social Development and Programme of Action, adopted by states at the World Summit for Social Development, provides that sustainable and equitable development must include democracy, social justice, economic development, environmental protection, transparent and accountable governance, and universal respect for, and observance of, all human rights.⁴²

The most comprehensive statement of what the Bank considers its role to be in promoting human rights is found in the 1998 Bank publication entitled, *Development and Human Rights: The Role of the World Bank*.⁴³ Therein, the Bank states its belief that creating the conditions for the attainment of human rights is a central and irreducible goal of development,⁴⁴ that sustainable development is “impossible” without human rights⁴⁵ and that it is the manner in which economic reform lending programs are implemented that is crucial to secure the needs of the poor.⁴⁶ Additionally, the Bank holds that poverty spreads deeper when the poor are subject to inequalities that dis-

41. *Id.*

42. *See Report of the World Summit for Social Development*, U.N. World Summit for Social Development, para. 26, U.N. Doc. A/CONF.166/9 (1995) (English version) (stating that the principles and goals of social development are to be based on dignity, human rights, equality, respect, peace, democracy, mutual responsibility and cooperation, and full respect for religious, ethical and cultural values of people).

43. *Development and Human Rights: The Role of the World Bank*, (The International Bank for Reconstruction and Development, The World Bank 1998) [hereinafter *Development and Human Rights*], available at <http://www.worldbank.org/html/extdr/rights/hrtext.pdf>.

44. *See id.* at 2 (observing that the advancement of human rights is impossible without development and that the world accepts this proposition).

45. *Id.*

46. *See id.* at 8 (claiming that it is not economic reform lending that should raise concerns about human rights, but rather, it is how those programs are implemented, and what measures are taken to ensure that the needs of the poor are not neglected).

able them from accessing the tools needed for economic growth.⁴⁷ Furthermore, the Bank believes that human rights cannot be guaranteed without a strong, accessible and independent judiciary.⁴⁸ The Bank also contends that property is the ultimate potential asset of every poor person.⁴⁹

These statements clearly show, in principle, the Bank's acceptance, albeit through the lens of poverty reduction, of human rights as fundamental to development and that the Bank does have a role to play in promoting, and through its good governance programs, enforcing human rights. Property rights, participation rights, special measures for excluded persons and groups, and judicial guarantees are all identified as fundamental to poverty reduction, the primary goal of the Bank.⁵⁰ Nevertheless, even though these recent statements are a marked improvement over the previous position of the Bank, they do not address the more fundamental issue of whether the Bank has an *obligation* to respect, promote, and protect human rights.

47. See *Development and Human Rights*, *supra* note 43, at 14 (stating that a feature of poverty is the dramatic inequalities in access to the prerequisites of economic growth: education, health care, credit and basic financial services, land, and knowledge). These disparities signal problems of more profound distortions, manifested in the exclusion from public services of women, ethnic, religious, and racial minorities, and geographically isolated communities. *Id.* This social exclusion can lead to social instability and, all too often, to violence. *Id.*

48. See *id.* at 15 (asserting that the Bank recognizes the importance of open and efficient courts to sustained and widely enforced economic growth).

49. See *id.* at 18 (maintaining that property is the foundation upon which citizens participate in community and political life and that when poor people own property in a secure and recognized fashion, they are more likely to attend school, seek medical care, invest in land, protect the environment, and build social harmony). The main problem in developing countries is that property claims by the poor, while acknowledged within the community, are often not recognized by the state. See *id.*

50. See The World Bank, International Bank for Reconstruction and Development, *Articles of Agreement*, art. I (effective Feb. 16, 1989) [hereinafter IBRD, *Articles of Agreement*] (setting forth the purposes of the Bank), at <http://www.worldbank.org/html/extdr/backgrd/ibrd/arttoc.htm>.

II. DOES THE BANK HAVE A LEGAL OBLIGATION TO RESPECT HUMAN RIGHTS?

This broader issue—whether the Bank has legal, as opposed to moral, obligations to respect human rights—turns largely on the legal interpretation given to the Bank's Articles of Agreement,⁵¹ its Relationship Agreement with the United Nations,⁵² an examination of the status or position of the Bank in the international legal system, and whether a duty to account for and respect human rights attaches to such status. In other words, do the Bank's Articles of Agreement prohibit or limit the Bank from addressing and accounting for the human rights of indigenous peoples and others? Furthermore, is the Bank a subject of international law with rights and duties arising thereby and, if so, what is the nature and extent of those duties as they apply to human rights?

A. THE BANK'S MANDATE AND ARTICLES OF AGREEMENT

The Bank's primary justification for not directly addressing the full range of international human rights in its policies and operations is the Bank's limited mandate, as defined by its Articles of Agreement.⁵³ This is perhaps best expressed by the former General Counsel of the Bank, Ibrahim Shihata, who stated:

There is the need to honor the charter of each organization and to respect the specialization of different international organizations as reflected in the statutory requirements of their respective charters. Such is the case, in particular, with the charters of specialized U.N. agencies, such as the World Bank, which delimit the mandate of each organization;⁵⁴

and,

For any international financial institution, such as the World Bank, the

51. See IBRD, *Articles of Agreement*, *supra* note 50 (articulating the World Bank's Articles of Agreement).

52. See discussion *infra* Parts II.B.2. (discussing the World Bank's Relationship Agreement with the United Nations).

53. See IBRD, *Articles of Agreement*, *supra* note 50, art. IV, sec. 10 (discussing the political activity that is prohibited by the Bank).

54. Ibrahim F.I. Shihata, *Democracy and Development*, 46 INT'L & COMP. L.Q. 635, 638 (1997).

question becomes, not whether human rights are relevant to development, but whether the mandate of any institution, as defined and limited by its Articles of Agreement, can cover the promotion and protection of all human rights, or is limited to the rights which have an economic or social character as opposed to a political character.⁵⁵

In essence, Shihata maintains that a textual and "teleological" interpretation of the language of the Articles precludes the Bank's attention to a broad range of human rights issues.⁵⁶ Specifically, he is referring to the prohibition of interference in the "political affairs" of Bank members and the requirement that only "economic considerations" are of relevance to the Bank's decision-making processes and operational activities (respectively, Article IV, section 10⁵⁷ and Article III, section 5(b)).⁵⁸ Pursuant to this, the Bank maintains that it is only authorized to deal with the economic aspects of development and is compelled to leave aside issues that may be defined as political.⁵⁹ In Shihata's opinion, the political prohibition even extends to preventing the Bank's Executive Directors from raising a state's human rights record when debating a loan proposal.⁶⁰

55. Ibrahim F.I. Shihata, *Human Rights, Development, and International Financial Institutions*, 8 AM. U. J. INT'L L. & POL'Y 27, 28 (1992).

56. See *id.* at 31 (concluding that the World Bank's mandate should enable the organization to aid member countries and to improve the economic standards of their peoples). See generally TETSUO SATO, *EVOLVING CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS* (1996) (discussing extensively the complexities of interpreting the constitutions of international organizations).

57. See IBRD, *Articles of Agreement*, *supra* note 50, art. IV, sec. 10 ("[T]he Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned.").

58. See *id.* art. III, sec. 5(b) ("The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.").

59. See IBRAHIM F.I. SHIHATA, *THE WORLD BANK IN A CHANGING WORLD* 78 (1991) (promoting that the Bank and its officers are required not to interfere in the political affairs of its members and to take only economic considerations into account).

60. See Ibrahim F.I. Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, 17 DENV. J. INT'L L. & POL'Y 39, 46-47 (1988) (articulating that only economic considerations, weighed impartially, are relevant to the Bank's decisions).

It is important to note here that the Bank's Articles do not define the terms "economic considerations," "political affairs," or "political character."⁶¹ Subject to certain limitations, primarily those set forth in international treaty law, the Bank's Board of Executive Directors has ultimate authority to interpret the Articles and is free to interpret the meaning of these terms.⁶² This open interpretation allows the Bank's Board to determine what is within its jurisdictional sphere and the Bank has done so numerous times in the past.⁶³ Issues addressed by the Bank's Board include several previously defined as political and excluded by the Articles including corruption and good governance.⁶⁴ I will return to each of these issues in greater detail below. In the meantime, it is important to understand the import of and problems with Shihata's position and reasoning.

1. Position of the Bank's Articles in International Law

Shihata's prioritization of the Bank's Articles places them above all other obligations the Bank and its Members may have as members of the United Nations system⁶⁵ and as subjects of international law, and implies that any action taken pursuant to the Articles is legitimate, irrespective of the prescriptions set forth in international law generally and international human rights law specifically.⁶⁶ As a recent U.N. study concludes, the effect is to turn the international legal order on its head:

61. See generally IBRD, *Articles of Agreement*, *supra* note 50 (failing to define these key terms and concepts).

62. See Shihata, *supra* note 55, at 29-30 (stating that by expanding the scope and types of lending in order to adopt to the changing needs of its borrowing members, the World Bank has continuously developed its functions).

63. See *id.* (explaining the significance of the expanded interpretation of jurisdiction).

64. See IBRD, *Articles of Agreement* *supra* note 50, art. IV, sec. 10 (discussing the Bank's prohibited political activity).

65. See WORKING PAPER, *supra* note 1, para. 30 (stating that honoring the charter of the World Bank is placed above any international obligations that the Bank may have).

66. See *id.* (deducing that the Bank's Articles are placed above all other Bank obligations).

The principal problem with the "honoring the charter" or "privileging the Articles" approach to the issue is that it subordinates the international human rights instruments to the charters of the agencies in question when, as a matter of law, the reverse should be the case. Human rights obligations emanate from the Charter of the United Nations and the Universal Declaration, and have come to represent a standard that in over 50 years of existence signifies a holistic approach to the human condition.⁶⁷

The Bank does not operate in a legal vacuum. It operates within the international legal system and both the Bank and its constituent agreement are governed by international law,⁶⁸ as neither the Bank nor its Articles are above the law.⁶⁹ The International Court of Justice ("ICJ") also confirmed that an interpretation and application of an international instrument must be made within the framework of the prevailing legal system at the time of its interpretation.⁷⁰ Additionally, Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides that treaty interpretation shall take into account "any relevant rules of international law applicable in the relations between

67. *Id.* para. 33.

68. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 671 (2d ed., Williams Clowes 1973) (explaining that political conditions, functional requirements, and historical development have created a decentralized system). See also C. WILFRED JENKS, *THE PROPER LAW OF INTERNATIONAL ORGANISATIONS* 3 (1962) (maintaining that if a body has the character of an international body, the law governing its life must be international in character); HENRY G. SCHERMERS & NEILS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* 822 (3d ed. 1995); SKOGLY, *supra* note 10, at 76-79 (articulating that international organizations are subjects of international law and actors with an international legal personality and therefore international law creates the framework within which the organizations have to work).

69. See William S. Hein, *Interpretation of the Agreement of the 25 March 1951 Between The WHO and Egypt*, in *INTERNATIONAL COURT OF JUSTICE: REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS* 89-90 (1980) (reporting that international organizations are bound by any obligations incumbent upon them under general rules of international law).

70. See William S. Hein, *Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, in *INTERNATIONAL COURT OF JUSTICE: REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS* 31 (1971) (concluding that an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations, and by way of customary law).

the parties.”⁷¹ Therefore, as a general proposition, the Bank is subject to international law and its Articles must be interpreted consistently with international legal principles, particularly those of a higher order, including human rights norms.⁷²

At its fifty-third session in 2001, the U.N. Sub-Commission on the Promotion and Protection of Human Rights made this point when discussing the International Monetary Fund’s (“IMF”) contention that its Articles do not require the IMF to respect human rights in its operations and policies.⁷³

Several Subcommission Experts, including Fisseha Yimer, Yozo Yakota, Asbjorn Eide, and Paulo Sergio Pinheiro, said they were surprised to hear the IMF state bluntly that the Fund was not bound by international human rights instruments and standards. Mr. Yokota added that while the relationship between trade and financial regimes and human rights regimes was a vital issue, those regimes should not be compared on an equal footing—human rights regimes were superior and could not be ignored even by agreements between States, or in the operations of international financial institutions.⁷⁴

71. International Law Commission, *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331, art. 31(3)(c), available at <http://www.un.org/law/ilc/texts/treaties.htm>.

72. See Gunther Handl, *The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development*, 92 AM. J. INT'L L. 642, 654-55 (1998) (discussing the impact of the law on sustainable development on interpretation of the political prohibition in the Bank's Articles). Handl persuasively argues that:

[T]he “political activity” clause in [Multilateral Development Banks'] constituent instruments represents a concept that is essentially open-ended or evolutionary by definition: the interpretation of such a concept, the International Court of Justice observed in the *Namibia* Advisory Opinion, cannot remain unaffected by the subsequent development of the law. As a matter of fact, its interpretation at any given time must reflect the coming into existence of sustainable-development-related international legal parameters applicable to states' economic development activities.

Id. at 657.

73. See SKOGLY, *supra* note 10, at 74-75 (discussing the absence of the political prohibition found in the Articles of the International Monetary Fund and comparing this significance).

74. World Trade Organization, *International Monetary Fund Respond to Sub-commission Report on Globalization*. U.N. Doc. HR/SC/01/11 (Aug. 8, 2001).

The relationship between the Bank's Articles and the rights and duties set forth in the Charter of the United Nations is clear. Both the Bank and its members have obligations under the Charter that supercede the provisions of the Articles.⁷⁵ One of the primary purposes of the United Nations Charter is to promote and encourage respect for human rights.⁷⁶ Therefore, the U.N. Charter's provisions on human rights are directly relevant to the larger issue of the Bank's responsibility towards human rights.

2. *The Prohibition of Political Interference*

As noted above, the prevailing interpretation within the Bank of its Articles leads to a classification of human rights issues as either economic or political. Those that can be classified as economic, social, or cultural rights are legitimate and cognizable, while those classified as political rights are beyond the jurisdiction of the Bank.⁷⁷ For this reason, the Bank often highlights what it perceives to be its contribution to furthering economic, social, and cultural human rights through poverty alleviation, while disregarding the majority of civil and political rights.⁷⁸

75. See U.N. CHARTER art. 103 (providing that in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter prevail); see also SHIHATA, *supra* note 59, at 76 (contending that members obligations under the United Nations Charter prevail over their treaty obligations under the Bank's Articles of Agreement, by means of an explicit provision of the United Nations Charter).

76. See U.N. CHARTER art. 1, para. 3 (declaring that one of the purposes of the United Nations is to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion).

77. See SHIHATA, *supra* note 59, at 75 (promoting that the Bank and its officers are required not to interfere in the political affairs of its members and to take only economic considerations into account); see also *Development and Human Rights*, *supra* note 43, at 3 (maintaining that the Bank's Articles of Agreement state that in all its decisions, only economic considerations are relevant).

78. See generally *Development and Human Rights*, *supra* note 43 (discussing the restriction placed on the Bank through its articles from confronting the issue of human rights). Discussing this requirement, the Bank states that:

Some believe that this restriction prevents the Bank from adequately confronting the issue of human rights. And to be sure, some aspects of human

Apart from contradicting the accepted position that all human rights are indivisible and interdependent, a position accepted by the Bank itself, this classificatory scheme is justly characterized as ambiguous, *ad hoc*, arbitrary, and at times self-serving insofar as it appears that the Bank readily justifies reinterpreting its mandate to cover areas that it wishes to operate, while arguing that it is prohibited by its Articles from those areas it wishes to avoid.⁷⁹ With regard to corruption, for instance, President Wolfensohn frankly states that the Bank decided "to redefine the word corruption, regarding it as an economic, rather than a political matter."⁸⁰ The Bank's position also belies the fact that almost all human rights have economic implications and most economic issues involve a series of political calculations and considerations.⁸¹

Shihata defines issues related to "the art and practice of running a country or governing," as "political," but he excludes "such typical economic and technical issues as the 'management of money or the finances' or more generally the efficient management of the countries' resources."⁸² The Bank's 'good governance programs and crite-

rights do fall outside its mandate. But the Bank's economic and social approach to development advances a comprehensive, interconnected vision of human rights that is too often overlooked. There is also practical, operational value in the way the Articles are drafted. Because lending decisions are based on the quality of the project, and the effectiveness of the programs in reducing poverty, the Bank has been able to escape the costly experience of committing scarce funds based on short-term political or ideological considerations, which have little to do with relieving the burden of poverty. For the World Bank, protecting and advancing human rights means helping the world's poorest people escape poverty.

Id. at 3.

79. See SKOGLY, *supra* note 10, at 74 (concluding that it is plausible to argue that unless something is specifically prohibited by the Articles of Agreement, and the carrying out of a specific program or policies can be reasonably deemed to assist in the fulfillment of the Bank's purposes, it would be seen as legitimate).

80. Thomas Fuster, *The World Bank's Fear of the Word "Politics" Walking a Fine Line in the Call for "Good Governance"*, NEUE ZÜRCHER ZEITUNG, Sept. 18, 1999, at http://www.nzz.ch/english/background/background1999/backgrou.../bg990918world_bank.htm.

81. See SKOGLY, *supra* note 10, at 98 (explaining that the Bank accepted that political considerations may be made if they influence economic performance and thus a link can be made between the economic position of a country and respect for human rights).

82. Ibrahim F.I. Shihata, Legal Opinion on Governance (unpublished), *quoted*

ria provide more information about the scope of the latter aspect and include attention to "the manner in which power is exercised in the management of a country's economic and social resources for development."⁸³ This includes accountability,⁸⁴ transparency,⁸⁵ and the rule of law.⁸⁶ Shihata's legal opinions have undoubtedly influenced the practice and understanding of the Bank.⁸⁷ However, other sources are equally, if not more relevant to understanding what is meant by the term "political affairs."

First, in international treaty law, if the use of a term in a treaty is unclear, one may make reference to materials supplementary to the text in order to ascertain the intent of the drafters.⁸⁸ The record of the

in Bradlow, *supra* note 15, at 54 n. 35, 60-1 nn. 60-2.

83. See THE WORLD BANK, GOVERNANCE AND DEVELOPMENT 3 (1992) (reporting that the Bank's interest in governance stems from its concern for the effectiveness of the development it supports and that a more relevant definition for Bank purposes is "the manner in which power is exercised in the management of a country's economic and social resources for development").

84. See *id.* at 13-28 (defining accountability as countering corruption by holding public officials responsible for their actions).

85. See *id.* at 31 (defining transparency as a means of preventing corruption through keeping information public).

86. See *id.* at 28-39 (holding that the Rule of Law is the aspect most important to economic development, and therefore to Bank assistance).

87. Shihata was Vice President and General Counsel to the Bank for 15 years. As the following quote indicates, Shihata's legal opinions may have been coloured by his own political beliefs. Addressing a Select Committee of the Canadian House of Commons in 1995, Shihata stated that "while it was critical to address corruption and other 'good governance' challenges, this meant 'walking a tight rope' between applying policy pressures that could be justified on economic grounds and crossing over the line into unacceptable political interference." See HOUSE OF COMMONS CANADA, *Chapter Four- Reforming the IFIS' Policy Frameworks: Accentuating Poverty Reduction and Sustainable Human Development*, FROM BRETTON WOODS TO HALIFAX AND BEYOND: TOWARDS A 21ST SUMMIT FOR THE 21ST CENTURY CHALLENGE, at http://www.g7.utoronto.ca/g7/governmental/hc25/hc25_c46.htm. While referring to a recent European Parliament resolution to change the Bank's articles of agreement to include democratic and human rights criteria (similar to the EBRD's constitution), Shihata's preference was to "support such objectives more indirectly in the context of continued economic liberalization." *Id.*

88. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31-32, 1155 U.N.T.S. 301 (providing that if parties cannot ascertain the meaning of a treaty term from the ordinary meaning given to the term in the context of the purpose of the treaty, parties may look to preparatory work of the

Bretton Woods Conference is therefore relevant to understanding the meaning of this term. Bradlow notes that the record of the Conference indicates that participants of the Conference enacted the political prohibition to ensure that the Bank conducts its decision-making processes and operations impartially, without reference to the political character of the state or states involved.⁸⁹ This is a far cry from the wholesale rejection of many human rights expressed by the Bank.

Significantly, the U.N.'s legal counsel arrived at a similar conclusion during the controversy over the Bank's refusal to comply with calls from the U.N. General Assembly in 1966, and reiterated in 1967 and 1968, that the Bank refused loans to South Africa and Portugal.⁹⁰ Responding to the Bank's argument that the political prohibition in its Articles preclude loan refusal for any non-economic reasons, the U.N.'s legal counsel, S.A. Bleicher, opines that the Bank

treaty and the circumstances of its conclusion to determine the meaning of the term); Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, *opened for signature* 21 March 1986, art. 31-32, 25 I.L.M. 543 (reiterating the above provisions of the Vienna Convention on the Law of Treaties); *see also* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 626-32 (4th ed. 1990) (summarizing Articles 31 and 32 of the Vienna Convention on the Law of Treaties).

89. *See* Bradlow, *supra* note 15, at 90 n.35 (asserting that statements made at the Bretton Woods Conference make it apparent that the political prohibition's purpose was to guarantee the Bank's impartiality); *see also* James C.N. Paul, *International Development Agencies, Human Rights and Human Development Projects*, 17 DENVER J. INT'L L. & POL'Y 67 (1988) (*citing* EDWARD MASON & ROBERT ASHER, *THE WORLD BANK SINCE BRETTON WOODS* 27-28 (1973)) ("The clause, which is now Article IV(10), was drafted to assure the USSR and other socialist states (e.g., Yugoslavia) that the Bank would not meddle with their political systems.").

90. *See The Policies of Apartheid of the Government of the Republic of South Africa*, G.A. Res. 2054, U.N. GAOR, 20th Sess., Supp. No. 14, at 16, U.N. Doc. A/6014 (1966) (recommending that economic sanctions be applied against South Africa due to its government's continuation of its apartheid policies); *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 2105, U.N. GAOR, 20th Sess., Supp. No. 14, at 4, U.N. Doc. A/6014 (1965) (requesting that all international institutions withhold assistance from the governments of Portugal and South Africa until they reverse their policies of racial discrimination and colonial domination); *see also* SCHERMERS & BLOKKER, *supra* note 68, at 1073-75 (explaining that the General Assembly requested that the Bank withhold assistance of any kind from Portugal and South Africa until their governments reversed their policies of colonial domination and racial discrimination).

was reading this requirement too broadly.⁹¹ As the record of a meeting indicates:

The first sentence of Section 10 appears to have as its purpose the prohibition of interference in the internal political affairs of a Member State and of discrimination against a State because of the political character of its government. He doubted very much that the sentence is intended to relate to criteria involving the international conduct of a State affecting its fundamental Charter obligations.⁹²

Later Bleicher wrote: "The policy goals underlying article IV, section 10, should not be construed as making no distinction between 'political affairs' and violation of the basic legal norms of the international system."⁹³ Much of the corpus of human rights law is generally considered part of the basic legal norms of the international system.

Second, the U.N. Charter has a similar provision prohibiting interference in internal political affairs.⁹⁴ However, it is standard and accepted practice within the U.N. that this provision does not apply to human rights because they are deemed to be of international concern and not solely within the internal sovereign or political sphere of states.⁹⁵ One conclusion that can be drawn from this is that the politi-

91. See Samuel A. Bleicher, *U.N. v. IBRD: A Dilemma of Functionalism*, 24 INT'L ORG. 31, 31 (discussing the refusal of the World Bank to deny benefits to Portugal and South Africa on the ground that it is a nonpolitical organization).

92. *Provisional Summary Record of the 1653rd Meeting*, [1966] at 382-3, U.N. Doc. A/C.4/SR.1653 (detailing Bleicher's position regarding the application of the first sentence in section 10).

93. Bleicher, *supra* note 91, at 47.

94. See U.N. CHARTER art. 2, para. 7 ("[N]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the DOMESTIC jurisdiction of any state. . .").

95. See BROWNLIE, *supra* note 68, at 294 (asserting that the U.N. has passed many resolutions on breaches of human rights and thereby has taken action on relations of governments to their own people); see also UNITED NATIONS, GENERAL ASSEMBLY, VIENNA DECLARATION AND PROGRAMME OF ACTION, para. 4, U.N. Doc. A/Conf.157/23 (1993) [hereinafter VIENNA DECLARATION AND PROGRAMME] ("[T]he promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community.").

cal prohibition cannot be interpreted as encompassing human rights because the international law understanding of the term "political affairs" does not include human rights and, thus, the Bank's Articles must be interpreted accordingly.⁹⁶

Third, as part of the exercise of their sovereign will, the vast majority of the Bank's Members have voluntarily committed themselves to abide by human rights standards through ratification of international conventions, through the formation of international customary human rights norms and, in some cases, by assenting to U.N. and other declarations.⁹⁷ In doing so, the Bank's members have accepted international obligations to promote, respect, protect, and fulfill human rights and, in many cases, international oversight of their compliance with these obligations. It is therefore extremely problematic, and contrary to accepted international practice, to characterize human rights as solely internal, political considerations, or, as the Bank often does, to characterize raising human rights issues as a violation of state sovereignty.⁹⁸ As Judge Weeramantry of the ICJ observes:

[T]he concept of human rights has long passed the stage when it was a narrow parochial concern between sovereign and subject. We have reached the stage, today, at which the human rights of anyone, anywhere, are the concern of everyone, everywhere. The world's most powerful States are bound to recognize them, equally with the weakest, and there is not even the semblance of a suggestion in contemporary international law that such obligations amount to a derogation of sovereignty.⁹⁹

96. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 31 (June 1971)* ("[A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.").

97. One hundred and forty-four of the Bank's one hundred and eighty-one members ratified the International Covenant on Civil and Political Rights, while one hundred and forty-two ratified the International Covenant on Economic, Social and Cultural Rights, and one hundred and seventy-nine ratified the Convention on the Rights of the Child.

98. It is nonetheless true that human rights instruments generally leave it up to the ratifying state to determine the means by which it will give effect to the rights set forth therein. This does not however remove the obligation to recognize, respect, enforce, and provide adequate and effective remedies for violations of human rights.

99. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montene-*

Integration of human rights issues into Bank policy-making and operational activities would, in the majority of cases, merely restate aims, objectives, and obligations already subscribed to by the vast majority of its members. A significant number of Bank members have monist legal systems under which these international obligations are an integral part of their domestic law; dualist states have incorporated, or are required to incorporate, these international obligations into domestic law.¹⁰⁰ Moreover, as discussed below, the Bank has obligations under international law not to undermine its members' ability to faithfully comply with, nor to facilitate violation by its members of, their international obligations, including those pertaining to human rights.¹⁰¹

Finally, it is relevant in this context to note that the Bank's Operational Policy 4.01 on Environmental Assessment clearly states that "the Bank takes into account . . . the obligations of the country, pertaining to project activities, under relevant international environmental treaties and agreements. The Bank does not finance project activities that would contravene such country obligations, as identified during the EA."¹⁰² The Bank's Operational Policy 4.36 on For-

gro)), § 2, at <http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm> (July 11, 1996).

100. See International Covenant On Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 2(2) (stating that "where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."), at http://www.unhchr.ch/html/menu3/b/a_ccpr (Nov. 16, 2001).

101. See *infra* notes 137-150 and accompanying text (explaining the Bank's obligations under international law regarding human rights).

102. WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICY 4.01, ENVIRONMENTAL ASSESSMENT, para. 3 (1999) [hereinafter OP 4.01]. See generally Mohammed Abdelwahab Bekhechi, *Some Observations Regarding Environmental Covenants and Conditionalities in World Bank Lending Activities*, in 3 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 290 (Jochen A. Frowein & Rudiger Wolfrum, eds., 1999) (explaining that the Bank started evaluating environmental issues of its projects in the 1970s); IBRAHIM SHIHATA, II THE WORLD BANK IN A CHANGING WORLD 183-236 (1995) (evaluating the Bank's legal instruments for achieving environmental goals); Charles E. Di Leva, *International Environmental Law and Development*, 10 GEO. INT'L ENVTL. L. REV. 501, 501 (discussing that the Bank can have an impact in its donor countries by attaching environment-related conditions on its loans); Ibrahim F.I. Shihata, *Implementation, Enforce-*

estry ("OP 4.36") also states that "the Bank does not finance projects that contravene applicable international environmental agreements."¹⁰³ If this is possible with regard to environmental obligations, is there a compelling reason why human rights obligations should not be accorded equal status?¹⁰⁴ The Bank's Senior Counsel agrees insofar as he states that the Bank must account for its Members' treaty obligations in general. He states:

Because governments are the owners of the institutions like the World Bank, and are bound to comply with the treaties they have ratified, multi-lateral financial institutions must be careful to ensure that if these treaties are implicated in their projects, the treaties are appropriately taken into account in project design and finance.¹⁰⁵

3. *Only Economic Considerations*

According to Shihata, the language "only economic considerations," which is the other side of the political-economic dichotomy found in the Bank's Articles, refers to only those issues that in the Bank's judgment have a "direct and obvious economic effect relevant to the [Bank's] work"¹⁰⁶ and dictates that the Bank focus exclusively on economic factors in its decision making unless non-economic issues exist in "such proportions as to become a Bank con-

ment, and Compliance with International Environmental Agreements Practical suggestions in Light of the World Bank's Experience, 9 GEO. INT'L ENVTL. L. REV. 37, 49 (explaining that the Bank has numerous mechanisms for ensuring donor countries' compliance with international environmental agreements, including the requirement of environmental impact assessment reports on projects considered for financing and the Bank's refraining from financing any projects that contradict the borrowing country's obligations under international environmental agreements).

103. WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICY 4.36, FORESTRY, para. 2 (1993).

104. See Press Release, Human Rights Watch, NGOs Urge Implementation of Wolfensohn Commitment to Human Rights (Sept. 22, 2000) (noting Bank President, James Wolfensohn's, commitment to "making explicit reference to human rights in Bank documents," and "to work with Bank staff to include human rights in their policy documents ..."), at <http://www.hrw.org/press/2000/09/prague.htm>.

105. Di Leva, *supra* note 102, at 501-2.

106. Bradlow, *supra* note 15, at 60 n.58 (quoting SHIHATA, *supra* note 102, at 53-97).

cern, either due to significant direct economic effects"¹⁰⁷ or because the non-economic issues result in "international obligations relevant to the Bank."¹⁰⁸ Professor Paul, however, argues that "the clause was intended to enjoin use of 'non-economic' (e.g., ideological) criteria as grounds to determine eligibility for Bank membership or for loans, and presumably, it commands that Bank loans must be confined to the promotion of 'economic development.'"¹⁰⁹

Further, Bradlow cogently argues that since the Bank implements projects over a relatively long time frame, "it is likely that within such a time frame almost all political, social and cultural issues will have a direct and obvious effect."¹¹⁰ To illustrate, Bradlow states:

Consider a Bank Member State that decides on human rights grounds to grant all criminal defendants the right to counsel and a fair trial. This decision would appear to be a political decision that is not relevant to Bank decision-making. However, this decision, over time, can have significant and potentially contradictory economic effects. On the one hand, the resulting improvement in the Member State's human rights situation could lead to an improvement in business confidence, which could result in increased investment, increased employment, and reduced social tensions. On the other hand, the decision could lead to a reallocation of resources towards the criminal justice system, which could result in a reduction of resources available to the civil justice system. The need for police officers to spend more time in court testifying in criminal trials could lead to a reduction in the number of police officers available to prevent crime. In addition, the decision could lead to a budgeting reallocation to the criminal justice system with adverse consequences for other areas of the budget. These developments could adversely affect business confidence leading to a reduction in investment, a rise in unemployment and social tensions, and a decline in the Borrower State's ability to perform its loan obligations. In either case, it is clear that the decision will have direct economic consequences.¹¹¹

107. Shihata, *supra* note 55, at 32; *see also* SHIHATA, *supra* note 102, at 575 (stating that a violation of individual political rights could become an issue in the Bank's decisions).

108. *Id.*

109. Paul, *supra* note 89, at 118-19.

110. Bradlow, *supra* note 15, at 62. *See generally* Daniel D. Bradlow & Claudio Grossman, *Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and IMF*, 17 HUM. RTS. Q. 411 (explaining the challenges international financial institutions face in the current era of states facing complex issues).

111. Bradlow, *supra* note 15, at 62.

4. Indigenous Peoples' Rights and the Political-Economic Test

Applying the political-economic test to indigenous peoples' rights poses even greater difficulties. These rights are often fundamentally related to and intertwined with ownership and control of land, which is widely accepted as the basis of indigenous political, social, spiritual, and cultural organization. These rights are also intergenerational, often involving rights and duties held of and owed to previous and future generations. A U.N. study on indigenous land rights, for instance, has found:

(i) a profound relationship exists between indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the intergenerational aspect of such a relationship is also crucial to indigenous peoples' identity, survival and cultural viability. There may be additional elements relating to indigenous peoples and their relationship to their lands, territories and resources which have not been captured by these examples.¹¹²

How does the Bank, in funding a project that affects indigenous peoples' land rights, separate out the economic, political, cultural, religious, and social aspects of those rights in order to determine what activities are within its jurisdictional competence? Rights to autonomy and self-government are predicated upon having a defined and recognized land base. Indigenous legal systems are fundamentally related to land and resource management and social cohesion. Security of tenure is fundamental to economic security and development opportunities as well as cultural survival. Indigenous economic activities, which are normally central to cultural identity, are in most cases based upon detailed knowledge and use of specific lands and waters. The latter clearly meets the Bank's jurisdictional test, the former not, yet they are each inseparably associated with indigenous territorial rights.

112. *Indigenous Peoples and Their Relationship to Land: Final Working Paper Prepared by the Special Rapporteur, Mrs. Erica-Irene Daes*, U.N. ECOSOC 4th Comm., 53d Sess., Provisional Agenda Item 5, para. 20, U.N. Doc. E/CN.4/Sub.2/2001/21 (2001).

The same may also be said for the prohibition of racial discrimination, a fundamental component of indigenous rights. This prohibition exists both independently and in connection with other rights. The prohibition of racial discrimination in connection with indigenous land and resource rights is of particular relevance. Clearly, discrimination has both political and economic facets that are interdependent and Bank publications have recognized the economic costs of discrimination against indigenous peoples as have others.¹¹³ Despite this recognition, the Bank refuses to treat indigenous land rights as a cognizable issue; instead, considering the issue part of the internal political realm of states.¹¹⁴

How does the Bank extricate those elements of indigenous cultural rights applying to economic matters from those applying to non-economic matters, when the authoritative interpreters of that culture, indigenous peoples themselves, would find such a distinction nonsensical and impossible to apply in practice? How does the Bank address indigenous people who view the land as the seat of their economic and physical well-being as well as the material incarnation of an ancestor and therefore, a relative? How does one separate the right to freely pursue economic, social, and cultural development from the right to freely determine political status, when each are dependent on the other? These considerations apply both to Bank operations and to the nature of safeguards provided by Bank Operational Policies, especially OP 4.10 on Indigenous peoples, but also the OPs on Forestry, Environmental and Social Assessment, Habitat protection, etc.

113. See Harry Anthony Patrinos, *The Costs of Discrimination in Latin America*, in HUMAN CAPITAL DEVELOPMENT AND OPERATIONS POLICY WORKING PAPERS, WORLD BANK I (discussing that indigenous, ethnic, racial and linguistic minorities are in an inferior social and economic position as compared to the mainstream population), at http://www.worldbank.org/html/extdr/hnp/hddflash/workp/wp_00045.htm; INDIGENOUS PEOPLE AND POVERTY IN LATIN AMERICA: AN EMPIRICAL ANALYSIS (George Psacharopoulos & Harry Anthony Patrinos eds., 1994) (examining the extent of poverty among indigenous as compared to non-indigenous populations across Latin America and providing policy recommendations to alleviate that situation).

114. See discussion *infra* Part III.B.1.

5. Conclusion

This section illustrates that Bank attention to human rights issues is partly a matter of the interpretation given to the language of its Articles of Agreement. The argument of the Bank, in particular its former General Counsel, is that the language of the Articles precludes Bank engagement with many human rights issues and places the Articles at the pinnacle of the legal order applying to the Bank.¹¹⁵ This position is sanctioned by the Bank's Board of Executive Directors, which has ultimate authority to interpret the Articles.¹¹⁶ The Bank also maintains that, while it may not address all human rights, it does substantially contribute to the realization of economic, social, and cultural rights and, indirectly through its governance programs, to the realization of civil and political rights.¹¹⁷ It should be noted here again that the Bank has never engaged in an analysis of whether it has any legal obligations with regard to human rights, but rather only whether, under its Articles and as a matter of discretion, it *may* or *should* promote or condition operations on human rights considerations and, if so, which.

The counter argument, which I believe to be correct, states that the Bank's Articles are not immune from the prescriptions of international law, human rights law in particular, and therefore cannot rule out attention to the full range of human rights. It also questions the prevailing interpretation of the political prohibition in the Articles and proposes alternative, and in light of contemporary international practice, more appropriate, interpretations.¹¹⁸ The economic-political

115. See Shihata, *supra* note 55, at 35 (stating that the World Bank's Articles of Agreement "cannot be appropriately interpreted to allow the World Bank to use its lending power as an instrument for ensuring respect for political human rights.")

116. See IBRD, *Articles of Agreement*, *supra* note 50, art. V, sec. 4 (discussing the authority of the Executive Directors).

117. See Shihata, *supra* note 55, at 28 ("[t]he question becomes not whether human rights are relevant to development, but whether the mandate of any institution, as defined and limited by its Articles of Agreement, can cover the promotion and protection of all human rights, or is limited to the rights which have an economic or social character as opposed to a political character.").

118. In this context, a series of U.N. General Assembly resolutions on the right to development have contained the following language:

Recalling that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protec-

dichotomy is presented as lacking any basis in fact that is both arbitrary and inconsistently applied. In the case of indigenous peoples' rights it presents substantial difficulties. Both as an international legal entity and as a forum for collective action by its members, the Bank has certain defined duties concerning human rights that cannot be ignored. At a minimum, Bank policies and practices must account for and respect human rights standards and the Bank should require—as does its policy on Environmental Assessment—that it will not finance projects that contravene its Members' international obligations.¹¹⁹

B. THE LEGAL OBLIGATIONS OF THE BANK TO RESPECT HUMAN RIGHTS

This section of the article looks at whether the Bank has a legal obligation to account for and respect human rights. This obligation may derive from a number of sources. Two of these sources, the duties incumbent upon subjects of international law and the obligations pertaining to specialized agencies of the United Nations, will be examined in this section.¹²⁰ The Member States of the Bank have clear

tion of civil, political, economic, social and cultural rights, and recognizing that all human rights are universal, indivisible, interdependent and interrelated and that the universality, objectivity, impartiality and non-selectivity of the consideration of human rights issues must be ensured;

and,

Recognizes that the Declaration on the Right to Development constitutes an integral link between the Universal Declaration of Human Rights and the Vienna Declaration and Programme of Action through its elaboration of a holistic vision integrating economic, social and cultural rights with civil and political rights.

The Right to Development, G.A. Res. 155, U.N. GAOR, 53d Sess., Agenda Item 110(b), at 1, 3, U.N. Doc. A/RES/53/155 (1999); *The Right to Development*, G.A. Res. 136, U.N. GAOR, 52d Sess., Agenda Item 112(b), at 2, 4, U.N. Doc. A/RES/52/136 (1998).

119. See OP 4.01, *supra* note 102, at 3 (stating that the Bank will not fund projects that would conflict with a country's existing obligation).

120. See Benedict Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples*, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 323, 325 (Guy S. Goodwin-Gill & Stefan Talmon, eds., 1999) (stating that with regard to the possible existence of an obligation to consult with persons affected by Bank policies, "such obligations might arise by implication from the Bank's con-

obligations to respect human rights, derived from a variety of sources, that also bear upon the overall obligations of the Bank. I will begin with the obligations of subjects of international law.

1. The Obligations of the Bank as a Subject of International Law

A subject of international law is an entity capable of possessing international rights and duties, along with the capacity to bring international claims.¹²¹ While not strictly equivalent, this can also be described as international legal personality.¹²² In the case of international organizations, international personality is normally determined by reference to their constituent instruments, either by virtue of an explicit statement conferring personality or by implication of their powers and functions.¹²³ The latter entails an examination of whether the attribution of legal personality is an indispensable requirement of the purposes of the organization and whether the organization was intended to exercise functions that can be explained only by possession of international personality.¹²⁴ The Bank's Articles do not explicitly state that it has international personality, however, references to its purposes, powers, and functions clearly demonstrate that it does and I have found no disagreement with this by either the Bank or scholars.¹²⁵

stitutive instruments and legal relations with members states, or from the Bank's own commitments to participation, or under general principles of law applicable to international organizations, or otherwise from public international law").

121. See BROWNLIE, *supra* note 88, at 58 (asserting that a subject of the law is able to have international rights and duties and has the capacity to maintain those rights by bringing international claims).

122. See *id.* at 60 (stating that questions of legal personality are connected to those of subjects of the law).

123. See *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 178 (describing that in order to determine whether or not the United Nations has legal personality, it is necessary to consider what characteristics its Charter intended to give it); see also C.F. AMERASINGHE, *PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS* 79 (1996) ("[I]nternational personality of organizations has evolved, as necessary, rather than emanated from explicit statements in constitutions.").

124. See AMERASINGHE, *supra* note 123, at 82 (explaining that the International Court of Justice uses these objective criteria in order to determine the existence of international legal personality).

125. See SKOGLY, *supra* note 10, at 63-68 (confirming the inference that the

As a subject of international law, the Bank has rights and duties, separate from and in addition to its Member States, defined by international law.¹²⁶ Those rights and duties, however, are not the same as those possessed by states. The latter possess the totality of rights and duties recognized by international law, whereas the rights and duties of the Bank are limited to those related to "its purposes and functions as specified or implied in its constitutional documents and developed in practice."¹²⁷ The Bank's purposes and functions, particularly as developed in practice, are directed towards poverty alleviation and economic development, often referred to as sustainable development, the ultimate aim of which is to improve the dignity and quality of human life.¹²⁸ The essence of human rights is the dignity and well-being of the human person, individually and collectively.¹²⁹ The right to development is itself a human right comprising economic, social, and cultural rights, as well as civil and political rights.¹³⁰ Also, the

Bank has an international personality); *see also* Bradlow, *supra* note 15, at 63 (stating that the Bank is a subject of international law because it is an international organization and that therefore it cannot violate customary international law); Bradlow and Grossman, *supra* note 110, at 428 (stating that international organizations such as the Bank are subjects of international law and therefore are bound by its norms); Handl, *supra* note 72, at 654-55 (reiterating that the rules of international law should be binding on international organizations such as the Bank); Kingsbury, *supra* note 120, at 324 (stating that the Bank may have legal obligations of consultation deriving from the Bank's constitutive documents and legal relations with its member states).

126. *See* AMERASINGHE, *supra* note 123, at 229 (explaining that whenever an international organization has international personality, it has functions, rights, and duties of its own).

127. Louis B. Sohn, *The U.N. System as Authoritative Interpreter of Its Law*, in 1 UNITED NATIONS LEGAL ORDER 189 (Oscar Schachter & Christopher C. Joyner, eds., 1995) (citing *Reparation for Injuries Suffered in the Service of the United Nations*, *supra* note 123, at 178).

128. *See* SHIHATA, *supra* note 102, at 183 (asserting that the World Bank institutions have a mandate to promote economic development in their member countries).

129. *See* VIENNA DECLARATION AND PROGRAMME OF ACTION, *supra* note 95, at 1 ("[R]ecognizing and affirming that all human rights derive from the dignity and worth inherent in the human person.").

130. *See Declaration on the Right to Development*, G.A. Res. 41/128, U.N. GAOR, at 2 (1986) ("[T]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in

Bank's activities, directly and indirectly, implicate a wide range of human rights issues.¹³¹ Consequently, the Bank's duties towards human rights should not be limited or excluded by the scope of its powers and functions.

a. Sources of Law

The Bank's international legal obligations may be located in a number of specific sources of law: international conventions, customary international law, general principles of international law, and peremptory norms of international law.¹³² According to Schermers,

[A]part from those peremptory norms of international law which form part of the legal order of all international organizations, further rules of international law are also applicable within international organizations . . . [A]s the latter have been established under international law, these rules of international law apply directly as part of the legal order of the organization in question obviating the need for transformation.¹³³

Thus, the Bank is bound by international law with regard to both its internal and external activities and, with the exception of treaty-based obligations, these obligations pertain to the Bank without any affirmative act on its part.

International human rights law is an important part of international law and is expressed in conventions, customary international law, peremptory norms, international obligations *erga omnes*, and general principles. As a general proposition then, the Bank also has obligations concerning the international law of human rights with regard to

which all human rights and fundamental freedoms can be fully realized."); *see also The Right to Development: Report of the Independent Expert on the Right to Development, Dr. Arjun Sengupta*, U.N. ESCOR, 4th Comm., 57th Sess., at 3 (2000) (reiterating that the right to development is an inalienable human right).

131. *See* SHIHATA *supra* note 102, at 76 (stating that members of the World Bank who are also members of the United Nations must comply with United Nations-imposed human rights obligations).

132. *See* AMERASINGHE, *supra* note 123, at 240-47 (discussing the source of substantive obligations of international organizations); *see also* SCHERMERS & BLOKKER, *supra* note 68, at 822-25 (citing customary international law, the constitution of an international organization, and general principles of international law as sources of law for international organizations).

133. SCHERMERS & BLOKKER, *supra* note 68, at 822.

its internal and external activities. The nature and extent of these obligations depends largely on their source, e.g., treaty, custom, peremptory norms. Beginning with treaties, the general rule of international law is that treaties fail to bind third parties without their express consent.¹³⁴ The Bank is not a party to any human rights conventions and therefore is not directly bound.¹³⁵ These instruments, however, may be relevant to the Bank's obligations: they may restate or inform the content of binding rules of customary international law,¹³⁶ they set out the obligations of most Bank Members, and they

134. See Vienna Convention on the Law of Treaties, *supra* note 71, art. 34, 1155 U.N.T.S. at 341 (indicating the intent of the agreeing countries that the treaty not create nonconsensual rights or obligations in third parties without their consent); Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, *supra* note 88, art. 34, 25 ILM at 564 (expressing that the treaty does not create either obligations or rights for third parties without consent).

135. However, Schermers, Blokker, Handl and others argue that circumstances exist that permit characterization of multilateral treaties as binding on international organizations even absent their consent. See SCHERMERS & BLOKKER, *supra* note 68, at 984 (arguing that even without its consent, an international organization can be bound to rules of international law); Handl, *supra* note 72, at 659-63 (opining that a treaty concerning issues of great importance to the international community, with widespread support from that community, may be viewed as one of general acceptance). Handl, for instance, states that:

A multilateral treaty that addresses fundamental concerns of the international community at large, and that as such is strongly supported by the vast majority of states, by international organizations and by other transnational actors. . . may indeed create expectations of general compliance; in short, such a treaty may come to be seen as reflecting legal standards of general applicability. Whatever the shorthand explanatory labels for this extended normative reach—some refer to the treaty provisions concerned as representing a “law of higher normativity,” others as giving expression to a general principle of law, still another as being the “product of a community consensus formed around the normative status of discrete decisions at international fora”—these treaties convey clear signals regarding the policy content and underpinnings of authority of the normative concepts involved, as well as the willingness of the international community to ensure their effectiveness, and as such must be deemed capable of creating rights and obligations both for third states and for third organizations, including MDBs.

Id. at 660-1 (footnotes omitted).

136. See Vienna Convention on the Law of Treaties, *supra* note 71, art. 38, 1155 U.N.T.S. at 341 (indicating the treaty's intent to allow for any rule to become binding upon a third party as a customary rule of international law); Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, *supra* note 88, art. 38, 25 ILM at 566 (reiter-

elaborate upon the human rights provisions of the U.N. Charter, a source of obligations for both the Bank and its Members.¹³⁷

Unquestionably, international organizations, including the Bank, must abide by customary international law and general principles of law.¹³⁸ The ICJ specifically refers to such obligations in its advisory opinion to the *WHO Agreement Case*.¹³⁹ According to the European Court of Justice, the European Community must follow international law and "comply with the rules of customary international law."¹⁴⁰ Morgenstern states that:

There is no reason why rules of international law which are generally recognized as applicable between States and which are not by their nature unsuitable for international organizations should not be automatically binding on the latter. Such a conclusion has been justified on the ground that States bound by rules of international law should not be able to evade

ating the rule in the Vienna Convention on the Law of Treaties that a treaty rule may become binding on a third party if it becomes a customary rule of international law).

137. See *infra* notes 162-86 and accompanying text (explaining the effect that these instruments have on the Bank's obligations).

138. See SCHERMERS & BLOKKER, *supra* note 68, at 824, 988 (stating definitively that international organizations are as much bound to customary law as states); AMERASINGHE, *supra* note 123, at 240 (describing situations in which customary international law binds international organizations); SKOGLY, *supra* note 10, at 84-87 (describing the development of customary international law and the obligations of many international organizations to abide by these common rules); Handl, *supra* note 72, at 654 (describing the statement by the International Court of Justice that as international organizations are subject to international law, they are bound by general rules of international law); Henry G. Schermers, *The Legal Bases of International Organization Action*, in A HANDBOOK ON INTERNATIONAL ORGANIZATIONS 401, 402 (René-Jean Dupuy ed., 1998) (suggesting that the reason that international organizations are bound by customary international law may be that the states that created them were themselves bound by this law); FELICE MORGENSTERN, LEGAL PROBLEMS OF INTERNATIONAL ORGANIZATIONS 32 (1986) (arguing that since rules of international law are not by their nature unsuitable for international organizations, they should be bound by them).

139. See Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 I.C.J. 73, 89-90 (Dec. 20) (expressing the opinion of the ICJ that international organizations, as subjects of international law, are bound by obligations under general rules of international law).

140. SKOGLY, *supra* note 10, at 85 (quoting the European Court of Justice in *Racke GmbH & Co and Hauptzollamt Mainz* from June 16, 1998, about respecting international law).

them collectively. Alternatively, if international organizations are seen as legal entities distinct from their members [possessing international personality], the applicability of the relevant rules can be explained as a necessary implication of legal capacity and activity in the international legal order.¹⁴¹

Also, international organizations are undoubtedly bound by peremptory norms of international law or *jus cogens*.¹⁴² These peremptory norms include the prohibition of racial discrimination, the prohibition of genocide, and the right to self-determination.¹⁴³

Related to peremptory norms is the concept of obligations *erga omnes*, first pronounced by the ICJ in the *Barcelona Traction Case*.¹⁴⁴ States owe these obligations "towards the international community as a whole . . . [I]n view of the importance of the rights

141. MORGENSTERN, *supra* note 138, at 32 (expressing the view that international organizations should be automatically bound by customary rules of international law).

142. See Vienna Convention on the Law of Treaties, *supra* note 71, arts. 53, 64, 1155 U.N.T.S. at 344, 347 (indicating that a treaty will be considered void if it conflicts with a peremptory norm of general international law, arising either before or after the completed treaty); Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, *supra* note 88, arts. 53, 64, 25 ILM at 572, 577 (reiterating the rule in the Vienna Convention on the Law of Treaties that a treaty becomes void if it conflicts with a peremptory norm of international law); see also BROWNIE, *supra* note 68, at 701 (indicating that an organization's particular acts in the law may be void if in contrast with *jus cogens*); Schermers, *supra* note 138, at 401-2 (indicating that international organizations are bound by peremptory norms of international law, such as the disallowance of aggression and racial discrimination).

143. See BROWNIE, *supra* note 68, at 513 (listing various rules of customary law that form *jus cogens*).

144. See *The Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 4, 32 (Feb. 5) (defining for the first time obligations *erga omnes* as a state's obligation towards the international community as a whole); *East Timor (Port. v. Austl.)*, 1995 I.C.J. 89, 90, 102 (June 30) (reiterating the idea of obligations *erga omnes* as it applies to the right of the people to self-determination); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yug.)*, 1996 I.C.J. 595, 616 (July 11) (Preliminary Objections) (finding, in this case, that the rights and obligations decided on by the Genocide Convention are rights and obligations *erga omnes*). Maurizio Ragazzi provides an extended treatment of obligations *erga omnes*. See MAURIZIO RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* (1997) (describing in depth and detail the idea of *erga omnes*).

involved, all States can be held to have a legal interest in their protection."¹⁴⁵ Obligations *erga omnes* derive from, among others, the prohibition of genocide and "from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."¹⁴⁶ Based in part on this statement, the International Law Institute supports the proposition that the general obligation to respect human rights constitutes an obligation *erga omnes*.¹⁴⁷ While normally stated as obligations of states, it would be appropriate and logical, given their fundamental, international character, to apply obligations *erga omnes* to all international legal persons, especially international organizations comprised of states such as the Bank.

b. Responsibility

Having established that the Bank does have legal obligations under international human rights law, I will now briefly touch upon the issue of responsibility in respect of those obligations. Brownlie observes that "there is no compulsory system for review of the acts of organizations by bodies external to them. In this situation the controls, such as they are, are provided by general international law. The correlative of legal personality and a capacity to bring international claims is responsibility."¹⁴⁸ According to Amerasinghe, the rules of responsibility for international organizations under international law may be defined in similar fashion to the rules of customary interna-

145. See *Barcelona Traction*, 1970 I.C.J. 4, 32 (exploring further the idea of *erga omnes* and why states have these obligations).

146. *Id.* See also Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 11-13 (describing the process used to determine which rights are included in an *erga omnes* reach). Meron concludes that the ICJ's opinion suggests that not all human rights constitute obligations *erga omnes*; only those that "are firmly rooted in international law" qualify. *Id.* at 11. However, he further notes that "international practice and scholarly opinion seem to have moved well beyond the *erga omnes* dictum of *Barcelona Traction*: perhaps the distinction between basic human rights and human rights *tout court*, as regards their *erga omnes* character, can no longer be supported." *Id.* at 13.

147. See RAGAZZI, *supra* note 144, at 144 (indicating the Institute of International Law's support of a general duty of respect for human rights).

148. BROWNIE, *supra* note 68, at 701.

tional law applying to state responsibility.¹⁴⁹ International organizations, including the Bank, are thus responsible for acts and omissions imputable to them that breach their international obligations.¹⁵⁰ With regard to human rights law, international organizations are responsible for breaches of the obligation to respect internationally recognized human rights, primarily those characterized as customary law and *jus cogens* norms.¹⁵¹

In order to determine if a breach has occurred, the precise nature of the obligation must be ascertained. For analytical purposes, human rights obligations are divided into different levels, each requiring a different level of commitment: positive, negative, or neutral.¹⁵² Positive obligations, such as the obligation to protect human rights and the obligation to fulfill human rights, require affirmative measures and acts in relation to both the substantive and procedural aspects of rights.¹⁵³ The obligation to respect human rights is largely a negative obligation requiring that the obligation holder refrain from violating rights and act consistently therewith.¹⁵⁴ Neutral obligations require

149. See AMERASINGHE, *supra* note 123, at 241 (analogizing between the customary law of state responsibility and the responsibility of international organizations).

150. See *Title and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, International Law Commission, 53d Sess., U.N. Doc. A/CN.4/L.602/Rev.1 (2001) [hereinafter *Draft Articles on Responsibility*] (codifying the law of state responsibility).

151. See *Study Concerning The Right To Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms. Final Report Submitted by Mr. Theo von Boven, Special Rapporteur*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., Agenda Item 4, at 16, U.N. Doc. E/CN.4/Sub.2/1993/8 (1993) [hereinafter *von Boven Report*] (stressing the importance of customary international law and that states and international organizations should follow it). See THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 136-245 (1989) (detailing extensively the responsibility of international organizations to respect human rights and humanitarian norms).

152. See generally SKOGLY, *supra* note 10, at 43-62 (discussing the evolution of international human rights law and the methods utilized in remedying violations).

153. See *id.* (opining that the obligation to fulfill some rights is positive and requires affirmative actions for protection).

154. See *id.* (indicating that most often obligations to protect human rights are negative and certain behavior must be avoided in order to avoid violations).

respect for present levels of (international) legal protection attributed to a right; an obligation not to make the human rights situation worse.¹⁵⁵

The obligations that attach to rules of customary international law and peremptory norms are generally negative and neutral: to act in accordance with and to refrain from violating these norms (negative), and to respect the current level of enjoyment (neutral). These obligations apply to both internal and external acts of the Bank and in the context of internal policies require that Bank policies account for, and are consistent with, customary and peremptory human rights norms. Amerasinghe states that international organizations' responsibility for violation of obligations defined by customary international law "will be based on fault, risk or absolute liability, as the case may be, depending on the obligation and the content of the applicable customary international law."¹⁵⁶

c. The Obligations of the Bank Vis-à-Vis the Human Rights Obligations of its Members

While the Bank has rights and duties separate from and in addition to its Member States, the obligations of its Members States also hold relevance. The Bank, like any subject of the law, must ensure that it neither undermines the ability of other subjects, including its members, to faithfully fulfill their international obligations nor facilitates or assists violation of those obligations.¹⁵⁷ This duty, in part, coincides with the general principle of international law, *pact sunt servanda*; a treaty binds the parties and must be performed in good faith.¹⁵⁸ The law of state responsibility is also of relevance here. Arti-

155. See *id.* at 45 (stating that neutral human rights obligations are those that a state or international organization has to not interfere with fundamental human rights).

156. AMERASINGHE, *supra* note 123, at 241 (indicating the basis of violations of customary law by international organizations).

157. See Bradlow, *supra* note 15, at 63 (suggesting that in those countries that are signatories to human rights conventions, the Bank must not undermine any efforts to abide by the conventions); Bradlow & Grossman, *supra* note 110, at 428 (describing that international organizations must refrain from undermining responsible countries and from supporting countries violating obligations).

158. See Vienna Convention on the Law of Treaties, *supra* note 71, art. 26, 1155 U.N.T.S. at 339 (binding treaty parties to perform duties in good faith); Vienna

cle 16 of the International Law Commission's Draft Articles on Responsibility of States for internationally wrongful acts reads:

AID OR ASSISTANCE IN THE COMMISSION OF AN INTERNATIONALLY WRONGFUL ACT. A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State ¹⁵⁹

The preceding adds an extra dimension to the obligations of the Bank and requires that its policies and operations account for and respect the obligations of its Members under ratified human rights conventions, regional as well as universal, and other sources of law binding on them. As parties to U.N. and regional human rights instruments, the Bank's Members must respect, ensure, and fulfill the rights set forth in those instruments. What this means in practice will vary depending on the specific obligations of the various Members of the Bank and how those obligations are implicated in Bank-financed activities. On a policy level, the Bank is obliged to ensure that policy formulation and implementation account for and respect its Members' human rights obligations. Bradlow and Grossman concur: "[I]n general, it is safe to assume that the IFIs should perform their functions in a way which supports the fundamental rights of individuals and peoples."¹⁶⁰ As noted above, the Bank's policy on Environmental

Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, *supra* note 88, art. 26, 25 ILM at 560 (holding parties bound to the treaty to perform it in good faith). See generally LORD MCNAIR, *THE LAW OF TREATIES* 493-505 (1961) (explaining extensively the principle of *pact sunt servanda* as the responsibility of parties to a treaty and the generally accepted idea that a treaty cannot be terminated unilaterally).

159. *Draft Articles on Responsibility*, *supra* note 150, at 5 (holding a cooperating state responsible in many cases for internationally wrongful acts committed by another state); see *supra* notes 126-31 and accompanying text (outlining the general responsibility of states in the international community). For an extended treatment of complicity in international law that the ILC considers to be a norm of customary international law, and the drafting history of Article 16, see John Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 1986 BRIT. Y.B. INT'L L. 77 (explaining in detail the background of Article 16).

160. Bradlow & Grossman, *supra* note 110, at 428 n.63 (arguing that although precise legal responsibilities of international organizations may vary from nation to

Assessment provides that it will not finance activities that contravene a State's obligations under international environmental treaties.¹⁶¹ Similar language and adherence thereto in the indigenous peoples and other policies would satisfy the Bank's human rights obligation at the policy level.

In summary, subjects of international law, including international organizations such as the Bank, are obliged to refrain from violating, and to respect, existing levels of legal protection accorded to human rights characterized as customary international law and *jus cogens*. These obligations apply both to the Bank's internal and external activities as human rights principles so characterized form part of the internal and external legal order of the Bank. The Bank is internationally responsible for imputable breaches of these obligations. Human rights conventions are not directly binding on the Bank, but are relevant insofar as they restate and further develop binding sources of law. The Bank also may not undermine its Members' ability to faithfully fulfill their international human rights obligations as defined by ratified instruments and other sources of binding law and, therefore, must account for and respect these obligations in its policies and operations.

Prior to drawing further conclusions about the full extent of Bank obligations, the obligations of the Bank as a specialized agency of the United Nations will be discussed. In doing so, a distinction must be drawn between the obligations of Bank Members separately and acting collectively through the Bank, and the obligations of the Bank as a separate legal person and specialized agency under the Charter of the U.N. While these obligations are related, they are nonetheless distinct.

2. The Obligations of the Bank as a Specialized Agency of the United Nations

The Bank was created in 1944, a year prior to the establishment of the U.N.¹⁶² Its status as a specialized agency of the U.N., and the na-

nation, they always include an obligations to support fundamental human rights).

161. See *supra* notes 102-05 and accompanying text (outlining the previously existing environmental policies of the Bank).

162. See *The World Bank Group: About Us*, at <http://www.worldbank.org/about>

ture of the relationship between the Bank and U.N., is based upon and defined by a treaty known as the Relationship Agreement.¹⁶³ This Relationship Agreement was made pursuant to Articles 57 and 63 of the U.N. Charter.¹⁶⁴ Article 4(3) of the Relationship Agreement stresses the Bank's independence and recognizes that:

action to be taken by the Bank on any loan matter is to be determined by the independent exercise of the Bank's own judgment in accordance with the Bank's Articles of Agreement. The United Nations recognises, therefore, that it would be sound policy to refrain from making recommendations to the Bank with respect to particular loans or with respect to the terms or conditions of financing by the Bank.¹⁶⁵

While the relationship created by this provision between the U.N. and the Bank provides for a much looser association than exists between the U.N. and other specialized agencies, it relates only to U.N. involvement in Bank decision-making processes rather than any larger responsibility the Bank may have under the U.N. Charter or international law in general. As evidenced by the General Assembly resolutions on South Africa and Portugal, the U.N., at least in the 1960s, opined that this provision did not preclude it from calling on the Bank to refuse loans due to the "conduct of a State affecting its fundamental Charter obligations."¹⁶⁶ Skogly observes that, "part of the reasoning behind bringing these organizations [specialized agen-

(stating that the bank was established July 1, 1944).

163. See Agreement Between the United Nations and the International Bank for Reconstruction and Development, Nov. 15, 1947, 16 U.N.T.S. 346 [hereinafter Relationship Agreement] (defining the terms on which the United Nations and the Bank established a formalized relationship).

164. See U.N. CHARTER arts. 57, 63 (establishing the existence and obligations of specialized agencies under the Charter).

165. Relationship Agreement, *supra* note 163, 16 U.N.T.S. at 348 (limiting the authority that the United Nations has over the Bank, in relation to this Agreement).

166. See *supra* note 75 and accompanying text (demonstrating that the Bank cannot take any action contrary to the Charter). Bleicher agrees, noting that the variation in national policies and political character is not legitimate, however, where the conduct of a state runs contrary to its obligations under the U.N. Charter. Colonialism and apartheid are not the 'political affairs' of the states which pursue them but are violations of the basic law of the community of nations. See Samuel A. Bleicher, *U.N. v. IBRD: A Dilemma of Functionalism*, 24 INT'L ORG. 31, 41 (1970) (stating his opinion that although there are differences in national policy, they still may not violate the Charter).

cies] into a formalized relationship with the U.N. must have been to grant them, both legally and practically, rights and obligations in relationship to the U.N. . . ."¹⁶⁷ These obligations, at a minimum, include respect for the principles and purposes of the U.N..

If this reasoning is correct, as a specialized agency of the U.N., the Bank has obligations derived from the U.N. Charter, in particular to act in conformity with the Charter.¹⁶⁸ Lauwaars concurs, stating that "Not only must the treaty establishing the organization between U.N. Member States be in accordance with the Charter and the obligations imposed upon the Member States by the Charter, but the decisions of the new organization itself must also comply with the Charter."¹⁶⁹ This means that the Bank's policies, internal and external, and operations must be formulated and implemented in accordance with the Charter's provisions on human rights. As noted above, the U.N. Charter supercedes the Bank's Articles.¹⁷⁰ This also implies that the Bank's Articles, particularly the interpretation given to the political prohibition, should be read consistently with the U.N. Charter and its human rights provisions.

The Charter's provisions dealing with human rights are rudimentary and lack specificity.¹⁷¹ Other than self-determination, the Charter only explicitly mentions the prohibition of discrimination.¹⁷² Partly for this reason, in 1948, the U.N. General Assembly adopted the

167. SKOGLY, *supra* note 10, at 100 (explaining, perhaps, the reasoning of the U.N. in forming relationships with certain international organizations).

168. *Id.* at 99-102 (insisting that the Bank's status as a specialize agency causes it to be obligated to act in accordance with the U.N. and the Charter).

169. R.H. Lauwaars, *The Interrelationship Between United Nations Law and the Law of Other International Organizations*, 82 MICH. L.R. 1604, 1605 (1984) (discussing that since almost all international organizations are formed with treaties, most likely they all must act in accordance with the Charter at all times); *see also* Bradlow, *supra* note 15, at 63 (indicating that as a specialized agency of the U.N., the Bank must act in conformity with the U.N. Charter); SKOGLY, *supra* note 10, at 101-2 (finding that the Bank must always act in accordance with the U.N. Charter, both with previous and future acts).

170. *See supra* notes 164-69 and accompanying text (explaining how the U.N. Charter takes a more dominant role in formulating Bank policies and procedures).

171. *See supra* notes 164-70 and accompanying text (exploring the power of the U.N. Charter over the actions and obligations of the Bank).

172. *See* U.N. CHARTER art. 1, paras. 2, 3 (stating specifically the U.N.'s intention of protecting self-determination and opposing many forms of discrimination).

Universal Declaration of Human Rights to elaborate upon and specify the Charter's human rights provisions and obligations.¹⁷³ The Universal Declaration expresses general principles of international law and binding norms of customary law despite its non-binding status when adopted.¹⁷⁴ Subsequent codification of human rights by the U.N., the International Covenants, and the Convention on the Elimination of All Forms of Racial Discrimination ("CERD")—cumulatively known as the International Bill of Rights—in particular, has also clarified any ambiguity in the meaning of the Charter's provisions. Professor Sohn observes that, although the Covenants:

resemble traditional international agreements which bind only those who ratify them, it seems clear that they partake of the creative force found in the Declaration and constitute in a similar fashion an authoritative interpretation of the basic rules of international law on the subject of human rights which are embodied in the Charter of the United Nations. Consequently . . . they are of some importance . . . with respect to the interpretation of the Charter obligations of the non-ratifying states.¹⁷⁵

Presumably this would also apply to the Charter obligations of non-ratifying subjects of international law, especially members of the U.N. system such as the Bank. The jurisprudence of the U.N. bodies, such as the Human Rights Committee and the Committee on the Elimination of All Racial Discrimination, charged with monitoring state compliance with human rights instruments, is also important in this context.¹⁷⁶ Their interpretations of the human rights instruments

173. See Bruno Simma, *Human Rights, in THE UNITED NATIONS AT AGE FIFTY: A LEGAL PERSPECTIVE* 263 (Christian Tomuschat ed., 1995) (stating that partly because the Charter contained so few human rights provisions, the U.N. adopted the Universal Declaration of Human Rights on December 10, 1948).

174. See MYRES S. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 272-4 (describing the evolution of the Universal Declaration of Human Rights from a mere aspiration to a widely accepted legal requirement); see also SKOGLY, *supra* note 10, at 120-5 (describing the birth of the Universal Declaration of Human Rights and how it has become largely a part of customary international law that binds all subjects of international law); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 42 (May 24) (recognizing the obligatory force of the Charter and the Declaration in finding that Iran deprived people of their freedom and subjected them to physical hardship).

175. Louis B. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L. J. 129, 135-6 (1977).

176. See *id.* at 136 (indicating the participation of certain U.N. agencies in the

not only inform the obligations of state-parties, they also develop greater understanding of the nature of Charter-based obligations.

The precise nature of the obligations of the Bank, particularly the extent thereof, under the U.N. Charter's human rights provisions requires further examination that is beyond the scope of this paper. For the time being, consider that, at a minimum, the Bank is required to respect the hierarchically superior authority of the Charter's human rights provisions by acting consistently therewith.¹⁷⁷ This is especially the case as one of the overriding purposes of the U.N. is "promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."¹⁷⁸ This duty to respect also applies to the Universal Declaration of Human Rights and, to a lesser extent, the Covenants and CERD as authoritative interpretations of the Charter's human rights provisions.¹⁷⁹

In practice, the nature and extent of the Bank's obligations under the Charter, while important, are not determinative of its overall human rights obligations. The Bank, as a subject of international law, must respect customary norms, *jus cogens*, and general principles of international law and large parts of the Universal Declaration constitute international custom, as do parts of CERD, the Covenants, and other international human rights instruments. The Bank also has obligations in relation to its Members' obligations.

The obligations of the Bank's Members are relatively straightforward. As members of the U.N., the U.N. Charter binds Bank Members¹⁸⁰ "to take a joint and separate action in cooperation with the

execution of instruments of human rights); *see also* U.N. CHARTER arts. 57, 63 (creating specialized agencies under the U.N. and outlining their obligations).

177. *See supra* notes 166-75 and accompanying text (explaining the Bank's obligations to comply with the provisions of the Charter, including its human rights provisions).

178. U.N. CHARTER art. 1, para. 3.

179. *See supra* notes 173-175 and accompanying text (detailing the realized necessity for the formulation of the Universal Declaration).

180. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1970 I.C.J. 16, 57 (June 21) (holding that members of the U.N. cannot violate the Charter in any way). On the binding status of the Charter's human rights provisions, *see* MERON, *supra* note 151, at 79-84 (explaining the obligations

Organisation for the achievement of the purposes set forth in Article 55.”¹⁸¹ Article 55 requires the U.N. to promote “universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”¹⁸² The Bank is essentially a collection of states, all bound by the obligation set forth in Articles 55 and 56 of the U.N. Charter to take joint action to promote universal respect for human rights upon ratification of the Bank’s Article of Agreement. The Bank is one place where such joint action is required.

Shihata confirms that the Bank is “bound, by virtue of its Relationship Agreement with the U.N., to take note of the above mentioned Charter obligations assumed by its members.”¹⁸³ As discussed above, the Bank must do more than just recognize the legal obligations of its Members, it cannot undermine their ability to faithfully fulfill their obligations, nor facilitate or assist with violation of those obligations. Consequently, the Bank’s Members are obligated to act in accordance with their Charter obligations in the course of their participation in Bank activities and the Bank is obligated to not undermine their ability to do so. The former is most likely stronger for the borrowing Members of the Bank as their dealings with Bank directly affect their populations.

The relevance of the Bank’s status as a specialized agency of the U.N. to its human rights obligations is twofold. First, it permits consideration of the progeny of the Charter’s human rights provisions when assessing the overall obligations of the Bank. These obligations therefore are not limited only to customary law, general principles and *jus cogens*, but also flow from the general obligations imposed by the U.N. Charter as interpreted and set forth in U.N. human rights instruments.¹⁸⁴ As authoritative interpretations of the Charter, the

involved in certain provisions of the U.N. Charter).

181. U.N. CHARTER art. 56 (emphasizing the importance to the U.N. of promoting fundamental human rights).

182. U.N. CHARTER art. 55, para. c (establishing the U.N.’s stance on discrimination and its intention of promoting certain freedoms).

183. SHIHATA, *supra* note 59, at 76 (emphasizing that the Bank’s obligation to comply with the Charter may be even more enforced than other international organizations as a result of the Relationship Agreement it has with the U.N.).

184. See U.N. CHARTER arts. 1, 55, 56 (outlining the U.N.’s intention to promote fundamental human rights).

Universal Declaration, the Covenants, and, to a lesser extent, other U.N. human rights instruments inform and illuminate the nature and extent of Bank obligations. As with customary law, the precise nature of these obligations in a given case will depend on the circumstances. At a minimum, the Bank is required to respect the core elements of the rights set forth in U.N. human rights conventions. Second, the Bank's Members are obligated to comply with the Charter's human rights provisions in their conduct within the Bank.¹⁸⁵ Also, although this will apply to any intergovernmental organization, the Bank must account for and not undermine the obligations of its Members under the Charter and U.N. human rights instruments.¹⁸⁶

3. Sustainable Development

Prior to turning to the content of draft OP 4.10 on Indigenous Peoples and its compatibility with international human rights standards, I will briefly raise an issue of relevance to the subject at hand that requires a great deal more attention in connection with the international legal obligations of the Bank.¹⁸⁷ I am referring to Judge Weeramantry's conclusion that the law of sustainable development is customary international law.¹⁸⁸ A number of scholars have also found that the law of sustainable development is part of general international law and binding on international organizations, including the Bank.¹⁸⁹

185. See U.N. CHARTER art. 1 (stating the U.N.'s decision to promote fundamental human rights).

186. *Id.*

187. See Handl, *supra* note 72 (addressing legal obligations of the Bank directly).

188. Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 92 (Sept. 25) (separate opinion of Judge Weeramantry) (opining that sustainable development is more than a theory, it is a part of international law), available at www.icjci.org/icjwww/docket/ihs/ihs_summaries/ihssummary_19970925.html.

189. See Handl, *supra* note 72, at 662 ("[T]here is no denying, of course, first, that there exists today a growing and ever more specific body of norms of international law bearing on 'sustainable development;' and second, that a large number of these concepts clearly represent affirmative duties upon states and international organizations, including MDBs, alike.").

The law of sustainable development involves three core components: human rights law, environmental law, and law applying to economic development.¹⁹⁰ These core components are so intertwined with the concept of sustainable development that it is impossible to pursue and fulfill the latter without addressing all three elements. Sands describes the international law of sustainable development as "a broad umbrella accommodating the specialized fields of international law which aim to promote economic development, environmental protection, and respect for civil and political rights."¹⁹¹ The Bank's mandate is directly related to sustainable development and it actively subscribes to the principle. As discussed above, customary international law also binds the Bank.

The concept and law of sustainable development incorporates all human rights within its ambit.¹⁹² The U.N. General Assembly, for instance, resolved that "democracy, respect for all human rights and fundamental freedoms, including the right to development, transparent and accountable governance in all sectors of society, as well as effective participation by civil society, are . . . an essential part of the necessary foundations for the realization of social and people-centred sustainable development."¹⁹³ To what extent "all human rights" can be said to be part of the customary law of sustainable development is questionable. However, access to information, informed participation, due process guarantees, effective judicial remedies, special

190. See Gabčíkovo-Nagymaros Project, 1997 I.C.J. at 92 ("The principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community."). Judge Weeramantry added that "[t]he components of the principle come from well-established areas of international law—human rights, State responsibility, environmental law, economic and industrial law, equity, territorial sovereignty, abuse of rights, good neighbourliness—to mention a few." *Id.* Others have added that "[t]he three pillars [of sustainable development] are composed of international environmental law, international human rights law and international economic law." See Dominic McGoldrick, *Sustainable Development and Human Rights: An Integrated Conception*, 45 INT'L & COMP. L.Q. 796, 796-97 (1996).

191. Philippe Sands, *International Law in the Field of Sustainable Development*, BRIT. YB INT'L L. 303, 378-79 (1994).

192. See Handl, *supra* note 72, at 662 (stating the inclusion of human rights law in sustainable development).

193. *Programme for the Further Implementation of Agenda 21*, G.A. Res. S-19/2, U.N. GAOR, Annex (June 28, 1997), *quoted in*, Handl, *supra* note 72, at 64.

guarantees for indigenous peoples and other so-called vulnerable groups, and rights related to environmental health and safety are certainly primary candidates.

The Bank's Operational Policies and its good governance programs address some of these issues, at least in part.¹⁹⁴ Nonetheless, it is safe to assert that it has not met the full extent of its human rights obligations inherent in the law of sustainable development through these policies and programs. For instance, many vitally important documents related to Bank-financed projects and programs are routinely labeled private property of the Borrower and, therefore, unavailable to the public.¹⁹⁵ Further attention is required to a wide range of human rights directly relevant to sustainable development, including those core elements partially listed in the previous paragraph. As we shall see below, this is especially the case for the rights of in-

194. See THE WORLD BANK, GOVERNANCE AND DEVELOPMENT, *supra* note 83, at 13-39 (explaining the Bank's policies on accountability and transparency).

195. See generally *The World Bank Policy on Disclosure of Information* (World Bank 1994); *World Bank Procedure 17.50 on Disclosure of Operational Information* (World Bank 1993) (describing the procedures for making documents public which are currently under review), at <http://wb1n0018.worldbank.org/institutional/manuals/opmanual.nsf/bprow/214F76B69F9D07E68525672C007D07A4?OpenDocument> (last visited Nov. 5, 2001); see also Letter from Toby Mendel, Head of Law Programme, Article 19, to James D. Wolfensohn, President, The World Bank (Feb. 16, 2001) (criticizing the Information Disclosure Policy of the Bank as inadequate and considerably substantial in relation to human rights guarantees), at <http://www.worldbank.org/infoshop/disclosure/letters.htm> (last visited Nov. 7, 2001); Rio Declaration on Environment and Development, *opened for signature* June 13, 1992, principle 10, at <http://www.unep.org/documents/Default.asp?DocumentID=78&ArticleID=1163>. In connection with this, Principle 10 of the Rio Declaration on Environment and Development, adopted at U.N. Conference on Environment and Development in 1992, states that:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Id.

digenous peoples.¹⁹⁶

The law of sustainable development is not only relevant to the Bank's general international obligations, but also relates to interpretation of its Articles:

196. It is extremely doubtful that Bank policies on Indigenous Peoples and especially Involuntary Resettlement meet sustainable development standards. Principle 22 of the Rio Declaration provides that: "Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development." See Rio Declaration on Environment and Development, *supra* note 195, at principle 22. Chapter 26 of Agenda 21 is entirely devoted to indigenous peoples. It reads:

In full partnership with indigenous people and their communities, Governments and, where appropriate, intergovernmental organizations should aim at fulfilling the following objectives:

(a) Establishment of a process to empower indigenous people and their communities through measures that include: (i) Adoption or strengthening of appropriate policies and/or legal instruments at the national level; (ii) *Recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate*; (iii) Recognition that their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development; (iv) Recognition that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities; (v) Development and strengthening of national dispute resolution arrangements in relation to the settlement of land and resource management concerns; (vi) Support for alternative environmentally sound means of production to ensure a range of choices on how to improve their quality of life so that they effectively participate in sustainable development; (vii) Enhancement of capacity-building for indigenous communities, based on the adaptation and exchange of traditional experience, knowledge and resource-management practices, to ensure their sustainable development; (b) Establishment, where appropriate, of arrangements to strengthen the active participation of indigenous people and their communities in the national formulation of policies, laws and programmes relating to resource management and other development processes that may affect them, and their initiation of proposals for such policies and programmes; (c) Involvement of indigenous people and their communities at the national and local levels in resource management and conservation strategies and other relevant programmes established to support and review sustainable development strategies, such as those suggested in other programme areas of Agenda 21.

Agenda 21: Earth's Action Plan, 508-09 (Nicholas A. Robinson, ed., 1993) (emphasis added).

In short, international normative concepts—including both general international law (customary international law and general principles of law) and, in certain circumstances, provisions of widely adhered to multilateral environmental agreements—do provide a dimension against which MDBs' articles of agreement can and must be viewed to make allowance for the sea change in international public policy epitomized by "sustainable development."

Thus, the increasing visibility of the normative implications of sustainable development has had a twofold effect: First, the progressive "internationalization" of decision making in the field of natural resource management and the environment, which may traditionally have been a matter only of domestic concern, clearly undercuts the persuasiveness of the claim that expanded MDB conditionalities amount to unacceptable interference with [Developing Member Countries'] "political affairs." For, to analogize to the Permanent Court of International Justice's holding in the Advisory Opinion on *Tunis-Morocco Nationality Decrees*, the scope of what constitutes "political affairs" at any given time is relative and depends on the development of international law. Second, and equally important, MDBs themselves can no longer afford to treat environmental and social concerns as merely incidental to development projects, but have an affirmative duty to incorporate these issues into the mainstream of their development-financing operations.¹⁹⁷

In the context of human rights law, this argument is fundamental to interpreting the position of the Bank and its Articles within the international legal system and the obligations applying to it as a subject of that system.

4. Conclusion

The Bank, both as a subject of international law and as a specialized agency of the U.N., has clear obligations concerning human rights. These obligations are separate from and in addition to those of its Members and apply to its internal and external operations.¹⁹⁸ As a subject of international law, the Bank is bound to respect norms of customary law, general principles of international law and peremptory norms, including those pertaining to human rights.¹⁹⁹ These ob-

197. Handl, *supra* note 71, at 647-48.

198. See AMERASINGHE, *supra* note 123, at 229 (discussing the legal obligations placed on the bank through international law).

199. See *id.* at 240-47 (defining the legal boundaries of the Bank's policies in

ligations are generally negative and neutral, requiring that the Bank refrain from violating human rights norms and respect the present level of international legal protection attributed to human rights.²⁰⁰ Its status as a specialized agency adds the duty to respect the core elements of human rights traceable to the binding provisions of the U.N. Charter. The law of sustainable development, at least those parts of it constituting customary international law, further defines the nature of the Bank's human rights obligations.²⁰¹ In both cases, the Bank is obligated not to undermine the ability of its members to faithfully fulfill their international obligations nor to facilitate or assist with violation of those obligations.²⁰²

In practice, the preceding has three effects. First, it amounts to a duty to ensure that the Bank's policies account for and respect human rights standards, especially those defined as customary norms and *jus cogens*. Second, it ensures that the Bank's lending and other operations are consistent with both its own and its Members' international obligations—one way to do so is by incorporation of, and explicit reference to, these obligations in its internal policies. Lastly, it requires that human rights issues inform all aspects of Bank practice.

The purpose of the preceding discussion is to provide a framework for the analysis of OP 4.10 below.²⁰³ If the Bank is to comply with its human rights and other obligations, the OP must account for and respect indigenous peoples' human rights and ensure that the obligations of its members are addressed. As we shall see, although the Bank has recognized the centrality of human rights to its mission and

the international arena).

200. See SKOGLY, *supra* note 10, at 43-62 (defining the types of human rights obligations).

201. See Gabcikovo-Nagymaros Project, 1997 I.C.J. at 92 (defining sustainable development as customary law): see also Handl, *supra* note 72, at 662 (explaining what type of law is involved in the discussion of sustainable development).

202. See Handl, *supra* note 72, at 662 (explaining the Bank's obligation to avoid undermining its members' human rights responsibilities).

203. See THOMAS GRIFFITHS & MARCUS COLCHESTER, REPORT ON A WORKSHOP ON 'INDIGENOUS PEOPLES, FORESTS AND THE WORLD BANK: POLICIES AND PRACTICES' 12 (2000) (describing the extensive revision process that the Bank has been implementing beginning in 1996) at <http://www.bicusa.org/mdbs/wbg/FinalsynthesisOctober2000.pdf>.

has taken some action to promote human rights in general, the present draft OP 4.10 not only falls short of accounting for indigenous peoples' human rights, it is in direct contravention of those rights.²⁰⁴ The Bank may assert that its role in promoting human rights is strategically focused on poverty and is limited by its Articles, but it cannot justify, by reference to its Articles or any other source, adopting a policy statement that deviates from its international obligations and undermines indigenous peoples' rights by, among others, setting standards below those already binding on almost all of its Members by virtue of ratified human rights instruments. Moreover, the provisions of OP 4.10 run counter to what the Bank has identified as prerequisites for poverty reduction, especially in the case of property rights and reducing conflict.²⁰⁵

III. OP 4.10 AND INDIGENOUS PEOPLES' HUMAN RIGHTS

Despite the efforts made by the United Nations and Governments over recent years, indigenous peoples continue to experience exclusion, discrimination, and marginalization in many of the countries in which they live. They are often poorly served by education, health, housing, and other services. They are also disproportionately affected by national development activities which displace them from their traditional lands and territories, often with negligible or no compensation, making them victims of development rather than its beneficiaries.²⁰⁶

This section of the article analyzes draft OP 4.10 on Indigenous Peoples of March 2001, and compares it with international human rights standards pertaining to indigenous peoples. Reference is also made to other World Bank safeguard policies, such as draft OP 4.12 on Involuntary Resettlement,²⁰⁷ when warranted. Rather than attempt

204. *See id.* (explaining Draft OP 4.10's failure to account for the rights of indigenous peoples).

205. *See supra* notes 45-48 and accompanying text.

206. Mary Robinson, Statement Given to the United Nations High Commissioner for Human Rights, Substantive Session of 2001, Economic and Social Council (July 24, 2001) (on file with author).

207. *See generally* THE WORLD BANK, THE WORLD BANK OPERATIONAL MANUAL, DRAFT OPERATIONAL POLICIES (OP 4.12) (Mar. 6, 2001) [hereinafter DRAFT OP 4.12], available at <http://wbln0018.worldbank.org/Networks/ESSD/>

a comprehensive analysis of the OP, I have chosen to highlight three issues: indigenous land rights, participation rights, and rights in relation to involuntary resettlement. These issues involve a range of other rights and issues, land rights especially, which implicate, among others, cultural rights, privacy rights, religious freedom rights, children's rights, as well as the majority of economic and social rights. These other rights will be touched upon as necessary. I begin with a brief overview of the history of Bank policies concerning indigenous peoples to provide some background to the present policy.

A. BACKGROUND

As early as 1981, the Bank published a document entitled *Economic Development and Tribal Peoples: Human Ecologic Considerations*, which sought to provide guidelines for Bank operations.²⁰⁸ The document states that the Bank should avoid "unnecessary or avoidable encroachment onto territories used or occupied by tribal groups;" ruled out Bank involvement with projects not agreed to by tribal peoples; required guarantees from borrowers that they would implement safeguard measures; and advocated respect for indigenous peoples' right to self-determination, at least in its economic and social aspects.²⁰⁹

This was followed in 1982 by an internal policy directive, Operational Manual Statement 2.34 Tribal People Bank-Financed Projects ("OMS 2.34"). Despite being written "after internal and external condemnation of the disastrous experiences of indigenous groups in Bank-financed projects in the Amazon region,"²¹⁰ this internal policy was weaker than, and failed to incorporate the protections contained

icdb.nsf/D4856F112E805DF4852566C9007C27A6/E80C51C4A005E6EA85256A100078DC88/SFILE/Draft+OP412.pdf (last visited Nov. 11, 2001).

208. ROBERT GOODLAND, *ECONOMIC DEVELOPMENT AND TRIBAL PEOPLES: HUMAN ECOLOGIC CONSIDERATIONS* (World Bank 1982).

209. See *id.* at 3, 27 (expressing the guidelines for World Bank projects in areas affecting tribal peoples).

210. See Kingsbury, *supra* note 120, at 324 (explaining that the Bank wrote the Operational Manual Statement 2.34 on Tribal People Bank-Financed Projects after much criticism of its operations in the Amazon region).

in, the 1981 document noted above.²¹¹ Moreover, an internal implementation review conducted in 1986-87 found that only two of thirty-three Bank projects substantially complied with the policy.²¹² Implementation failures and sustained criticism of Bank projects by indigenous peoples, NGOs and others,²¹³ led the Bank to revise and update OMS 2.34, concluding in 1991 with the adoption of Operational Directive 4.20 on Indigenous Peoples ("OD 4.20").²¹⁴

OD 4.20 strengthened Bank policy concerning indigenous peoples by requiring the informed participation of indigenous people; accounting for indigenous preferences in project design; strengthening domestic legislation on indigenous rights; paying special attention to securing indigenous land and resource rights; and developing specialized Indigenous Peoples' Development Plans to provide for culturally appropriate benefits and mitigation plans in all projects affecting indigenous peoples.²¹⁵ While OD 4.20 is an improvement over its predecessor, it has not assuaged critics of Bank projects, especially since compliance with the policy has been inconsistent at best.²¹⁶ An internal review of seventy-two Bank projects in Latin

211. *See id.* (explaining the weakness of the 1982 policy directive).

212. *See* OFFICE OF ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, WORLD BANK, TRIBAL PEOPLES AND ECONOMIC DEVELOPMENT: A FIVE YEAR IMPLEMENTATION REVIEW OF OMS 2.34 (1982-1986) AND A TRIBAL PEOPLES' ACTION PLAN (1987) (finding that projects were not complying with the new procedures for work involving tribal peoples).

213. *See generally* Andrew Gray, *Development Policy. Development Protest: The World Bank, Indigenous Peoples and NGOs*, in *THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS* 267 (Jonathan A. Fox & L. David Brown eds., 1998) (describing Bank projects and policies affecting indigenous peoples and criticism thereof).

214. *See* Shelton Davis, *The World Bank and Operational Directive 4.20: The World Bank and Indigenous People*, in *INDIGENOUS PEOPLES AND INTERNATIONAL ORGANISATIONS* 75 (Lydia van de Fliert ed., 1994) (discussing the revision process completed by the Bank as to their policy on tribal people and the contours of the new policy, OD 4.20).

215. *See* Kingsbury, *supra* note 120, at 329 ("Operational Directives have thus been understood to be 'binding' on Bank staff within the Bank management structure, but applied and enforced flexibly rather than 'legalistically.'").

216. *See id.* at 327-29 (explaining that noncompliance with the Bank's policies happens regularly for many reasons); *see also* Gray, *supra* note 213, at 288 (describing that while there are several opportunities for the application of the new policy there is no evidence yet of the effectiveness of compliance); *see also*

America, for instance, found that over one-third of the projects failed to incorporate the required Indigenous Peoples Development Plan and only half of the projects involved consultation with indigenous authorities about project design and implementation.²¹⁷

In 1993, the Bank began to convert its internal policies to a new format: obligatory operational policies, obligatory Bank procedures, and non-binding good practices.²¹⁸ In 1996, an internal, *ad hoc* working group initiated conversion of OD 4.20 to this format.²¹⁹ The Bank developed an Approach Paper and publicly distributed the paper in 1998, following the distribution with a series of consultations with indigenous peoples and NGOs at the end of the same year.²²⁰ The Bank then worked internally on a draft policy, which it said would be made public for further consultation in July 2000.²²¹ Due to internal Bank approval procedures and a contentious internal debate about the role of Operational Policies—not to mention a highly critical Inspection Panel report on the China Western Poverty Reduction Project that directly dealt with OD 4.20 and found serious violations of this policy as well as those on Environmental Assessment, Involuntary Resettlement, Natural Habitats, Pest Management, and Information Disclosure—the Bank did not release the draft policy, re-

GRIFFITHS & COLCHESTER, *supra* note 203, at 9-10 (noting substantial failures to comply with the policy).

217. See K. Swartz & J. Urquillas, *Aplicacion de la Politica del Banco Sobre law Poblaciones Indigenas (OD 4.20) en America Latina (1992-1997)* (Oficina Regional de America Latina y el Caribe, Banco Mundial 1999), *cited in* GRIFFITHS & COLCHESTER, *supra* note 203, at 16 (explaining that projects that did comply with the policy were specifically focused on indigenous peoples and were still in the preparation phase of the project).

218. See GRIFFITHS & COLCHESTER, *supra* note 203, at 8-11 (discussing the internal revision process of the Bank).

219. See *id.* at 12 (describing the extensive revision process that the Bank implemented beginning in 1996).

220. See S. Davis et al., *Approach Paper on Revision of OD 4.20 on Indigenous Peoples* (recommending certain revisions to OD 4.20, specifically to identification of indigenous peoples, policy objectives and framework, and measures and procedures to facilitate policy implementation), at <http://wb1n0018.worldbank.org/essd/essd.nsf/28354584d9d97c29852567cc00780e2a/5e23e566bed37cd6852567cc0077f48d?OpenDocument> (last visited on Nov. 5, 2001).

221. See *id.*

named OP 4.10, until March 2001.²²² In June 2001, the Bank announced that it would hold further consultations with indigenous peoples and interested NGOs between August and October 2001 (later extended to February 2002)—a timeframe heavily criticized by indigenous peoples who are becoming increasingly frustrated with the Bank's approach to public consultation and increasingly critical of the text of the draft policy²²³—and that the policy would be finalized by early 2002.

The draft OP is substantially based on OD 4.20. During the revision process, the Bank, according to its own statements, attempted to maintain the level of OD 4.20 while at the same time providing greater clarity to its language as part of improving implementation and compliance rates. Whether the Bank achieved greater clarity is debatable. It is clear, however, that the Bank weakened the policy in certain important respects, particularly the participation standard. Moreover, maintaining the standard set by OD 4.20 fails to account for a substantial evolution in international law and practice concerning indigenous rights that has occurred since 1991.²²⁴ This is all the more disturbing given that when the Bank wrote OD 4.20 in 1991, it did not meet international human rights standards.²²⁵

Finally, indigenous peoples and NGOs have long maintained that

222. See, GRIFFITHS & COLCHESTER, *supra* note 203, at 12 (stating the reasons for the delay in the release of OP 4.10 was because of review procedures at the Bank and the Inspection Panel's report on the Bank's previous failures with indigenous peoples).

223. See Indigenous Peoples, Statement at the 19th Session of the U.N.WGIP (July 29, 2001) (on file with author) (criticizing that draft OP 4.10 "does not build upon and reinforce the positive language in the existing policy; fails to incorporate many of the key recommendations made by indigenous peoples during previous consultations on the Bank's "approach paper" on the revision process; uses language that confuses consultation with effective participation; lacks binding provisions that seek to guarantee indigenous land and resource security; fails to recognize the right to free, informed prior consent; does not prohibit the involuntary resettlement of indigenous peoples; is not consistent with existing and emerging international standards on human rights and sustainable development; and does not advance international standards for dealing with indigenous peoples in development.").

224. See OP 4.10, *supra* note 37, at 9 (explaining the types of participation that indigenous peoples would have under the revised policy).

225. See *supra* notes 218-23 and accompanying text (outlining the changes in law that affect the Bank and its obligations to human rights).

any revision of the Bank's policy should be done pursuant to an implementation review of the existing policy.²²⁶ This review, particularly the lessons learned from implementation and compliance failures, should feed into the larger process of revising the policy. In March 2001, the Bank's Operations Evaluation Department announced that such a review would take place. This review is presently underway, with completion of Phase I expected in the first half of 2002. Bank staff charged with the policy revision have stated, however, that they will only incorporate the lessons of Phase I of the OED review, rather than waiting for the findings of Phase II (December 2002).²²⁷ The latter is a participatory field review of Bank projects that will incorporate indigenous peoples' perspectives into the conclusions of the overall review, as well as deal more fully with compliance issues.²²⁸

As we can see, the Bank's policy towards indigenous peoples has improved since 1982. However, progress has been mostly cosmetic in the absence of a clear commitment by the Bank to implement and comply with the policy. Internal reviews, as well as frequent complaints by indigenous peoples, repeatedly demonstrate that compliance failure rates are far beyond acceptable.²²⁹ This is not to say the indigenous peoples do not benefit from some Bank projects, especially those projects specifically designed to benefit them, or that compliance failures are always entirely the fault of the Bank. Nonetheless, these failures have sometimes been associated with serious human rights abuses and a substantial decline in standard of living for affected indigenous peoples.²³⁰ While the Bank often character-

226. See GRIFFITHS & COLCHESTER, *supra* note 203, at 4 (stating that one of the obstacles to an effective policy is the lack of an attempt to create policies that match international human rights standards).

227. See *id.* (listing the recommendations given to the Bank to improve the policy including a participatory implementation review).

228. Phase I of the project is a desk-based review of over 100 projects in six different geographical regions affecting Indigenous peoples. See WORLD BANK, OPERATIONS EVALUATION DEPARTMENT, PROTECTING INDIGENOUS PEOPLES: AN OED EVALUATION OF OPERATIONAL DIRECTIVE 4.20, available at http://www.worldbank.org/oed/indigenouspeople/docs/ip_evaluation.pdf.

229. See *supra* notes 218-23 and accompanying text.

230. See GRIFFITHS & COLCHESTER, *supra* note 203, at 16 (showing the lack of compliance exhibited by the Bank).

izes these situations as “learning experiences,” for indigenous peoples and others they are clearly unacceptable and create lasting adverse impacts on their quality of life.

B. THE POLICY ITSELF

Paragraph 1 of OP 4.10 states that its “broad objective” is to “ensure that development process fosters full respect for the dignity, human rights and cultures of indigenous peoples, thereby contributing to the Bank’s mission of poverty reduction and sustainable development.”²³¹ Paragraph 2 recognizes that the “identities, cultures, lands and resources of indigenous peoples are uniquely intertwined and especially vulnerable to changes caused by development programs.”²³² Consequently, indigenous peoples require “special measures” to ensure that they are not disadvantaged by development programs and that they participate in and benefit from them.²³³

The broad objective set out in paragraph 1 is consistent with the Bank’s statements above concerning the relationship between human rights and the Bank’s mission of poverty reduction and sustainable development.²³⁴ Logically, if the Bank is to ensure and foster “full respect for the dignity, human rights and cultures of indigenous peoples,”²³⁵ the OP should both account for and be consistent with indigenous peoples’ human rights. The same is also true for the nature of the “special measures” envisaged in paragraph 2. Additionally, as the Bank acknowledges that indigenous peoples are especially vulnerable, particular care and diligence should be required when applying the safeguards set out in the OP.

As we shall see, this is not the case, both in terms of consistency with human rights standards and the procedures that must be followed to implement the policy. In discussing this, I will extensively refer to international human rights standards set forth in conventions of general application (as well as those directly dealing with indige-

231. OP 4.10, *supra* note 37, para. 1.

232. *Id.* para. 2.

233. *Id.*

234. See *supra* notes 39-43 and accompanying text (explaining the goals of social development).

235. OP 4.10, *supra* note 37, para. 1.

nous peoples' rights), the jurisprudence of the bodies charged with oversight of those conventions, customary international law, and emerging standards on indigenous peoples' rights as set forth in the U.N. draft Declaration and the Proposed American Declaration on the Rights of Indigenous.

*1. Land and Resources – OP 4.10, paragraphs 12 and 13*²³⁶

Paragraphs 12 and 13 of OP 4.10 read as follows:

12. The economies, identities and forms of social organization of indigenous peoples are often closely tied to land, water and other natural resources. Therefore, in Bank-assisted projects which affect indigenous peoples, the Borrower takes into account their individual and collective rights to use and develop the lands that they occupy, to continue to have access to natural resources vital to their subsistence, to the sustainability of their cultures, and to their future development;

13. In order to avoid or minimize adverse impacts of Bank-assisted projects on affected indigenous groups, and to determine measures which may be needed to enhance their security over lands and other resources, in the design of the project the Borrower gives particular attention to:

- (a) the cultural, religious and sacred values that these groups attribute to their lands and resources;
- (b) their individual and communal or collective rights to use and develop the lands they occupy and to be protected against encroachment;
- (c) their customary use of the natural resources vital to their cultures and ways of life; and
- (d) their natural resources management practices and the long-term sustainability of these practices.

Where a Bank-assisted project has an impact on the lands and resources occupied or used by indigenous peoples and taking into account the Borrower's legislation, consideration is given to establishing legal recognition of the customary or traditional land tenure systems of affected indigenous peoples or granting them long-term renewable rights of custodianship and use.²³⁷

236. See ERICA-IRENE A. DAES, *INDIGENOUS PEOPLES AND THEIR RELATIONSHIP TO LAND* (U.N. 1999) (analyzing the problems affecting indigenous land rights).

237. OP 4.10, *supra* note 37, paras. 12, 13.

While these paragraphs note the cultural significance of indigenous lands, territories, and resources, very little is required with respect to the recognition of and respect for indigenous rights over them and the policy fails to require in any way that indigenous ownership rights be recognized and respected. They simply require that the Borrower "takes into account" indigenous individual and collective rights, that the Borrower "gives particular attention to" indigenous rights, and, with a view to the Borrower's legislation, "that consideration is given to establishing legal recognition of the customary or traditional land tenure systems of affected indigenous peoples or granting them long-term renewable rights of custodianship and use."²³⁸

The indigenous rights referred to are the "individual and collective rights to use and develop the lands that they occupy."²³⁹ Use and development of lands may be incidents of ownership, but they are not equivalent; ownership amounts to control, although not necessarily absolute control, over a thing. In practice, should the state be opposed to recognition of indigenous ownership rights, it need not do so and may implement a variety of projects in violation of indigenous rights.

International law, on the other hand, requires that indigenous peoples' ownership and other rights to their lands, territories and resources be legally recognized and respected, which includes titling, demarcation, and ensuring their integrity. These rights are protected under international law in connection with a variety of other rights, including the general prohibition of racial discrimination, the right to property, and the right to cultural integrity as part and parcel of the right to self determination.

That the right to self-determination applies to indigenous peoples is clear from the observations of the U.N. Human Rights Committee ("HRC"), the body charged with monitoring state compliance with the U.N. International Covenant on Civil and Political Rights ("ICCPR").²⁴⁰ In its Concluding Observations on Canada's fourth pe-

238. *Id.*

239. *Id.*

240. See *United Nations Draft Declaration on the Rights of Indigenous Peoples*, art. 3 [hereinafter *U.N. Draft Declaration*] ("Indigenous peoples have the right to

riodic report, the HRC stated that:

With reference to the conclusion by the [Royal Commission on Aboriginal Peoples] that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (article 1(2)). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.²⁴¹

The HRC reached similar conclusions—that the State should implement and respect the right of Indigenous peoples to self-determination, particularly in connection with their traditional lands—in its Concluding Observations on the reports of Mexico and Norway issued in 1999 and Australia in 2000.²⁴² In its complaints-

self determination. This means they can freely determine their political status and identity and pursue their own economic, social and cultural development.”), *available at* <http://www.usak.ca/nativelaw/ddirplaint.html> (last visited Nov. 7, 2001). The Inter-American Commission on Human Rights recognized some measure of this right in its proposed American Declaration on the Rights of Indigenous Peoples (1997), art. XV(1) when they acknowledged that:

Indigenous peoples have the right to freely determine their political status and freely pursue their economic, social and cultural development, and accordingly, they have the right to autonomy and self-government with regard to inter alia culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, the environment and entry by non-members; and to the ways and means for financing these autonomous functions.

Proposed American Declaration on the Rights of Indigenous Peoples, art. xv(1) (Feb. 26, 1997), *available at* <http://www.cidh.oas.org/indigenous.htm>.

241. *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Canada*, U.N. Human Rights Committee, 65th Sess., para. 8, U.N. Doc. CCPR/C/79/Add.105 (1999).

242. *See Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Mexico*, U.N. Human Rights Committee, 66th Sess., para. 19, U.N. Doc. CCPR/C/79/Add.109 (1999) (concluding that the State should take action to protect the rights of indigenous peoples); *see also Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Norway*, U.N. Human Rights Committee, 67th

based jurisprudence, the HRC also relates the right to self-determination to the right of indigenous peoples to enjoy their culture under Article 27 of the ICCPR.²⁴³

The right of all peoples to self-determination has both procedural (determining political status and pursuing economic, social, and cultural development and the right to give or withhold consent) and substantive aspects (*inter alia*, the right to autonomous, self-government and the right to ownership of and control over lands, territories, and resources).²⁴⁴ Self-determination has been described as “a fundamental human right the enjoyment of which is an essential precondition for the enjoyment of any other human rights and fundamental freedoms.”²⁴⁵ Self-determination is thus of a much wider scope than

Sess., paras. 10, 17, U.N. Doc. CCPR/C/79/Add.112 (1999) (noting positive changes in the treatment of the Sami, Indigenous people relating to language, cultural institutions, and legal disputes over land); *see also Consideration of Reports Submitted Under Article 40, Concluding Observations of the Human Rights Committee, Australia*, U.N. Human Rights Committee, 69th Sess., sec. 3, paras. 498-528, U.N. Doc. A/55/40 (2000) (finding that the State must take further actions to protect the titles and interest of the indigenous people in their land).

243. *See Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Communication No. 547/1993*, U.N. Human Rights Committee, 70th Sess., para. 9.2, U.N. Doc. CCPR/C/70/D/547/1993 (2000) (“[T]he provisions of article 1 [the right to self-determination] may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27...”).

244. *See Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples by Erica-Irene A. Daes, Chairperson of the Working Group on Indigenous Populations*, U.N. Commission on Human Rights, 45th Sess., at 4-5, U.N. Doc. E/CN.4/Sub.2/1993/Add.1 (1993) (explaining that self-determination in the draft Declaration requires that indigenous peoples exercise their right to self-determination through the states’ political and legal systems unless those systems are “so exclusive and non-democratic that [they] can no longer be said to be representing the whole people”). States have a corresponding duty to adopt legal, administrative, and constitutional reforms that recognize the rights of indigenous peoples to, among other things, autonomy, self-government, territory, cultural integrity and participation based upon consent. *Id.* Secession is only possible as an exceptional measure should the state fail to accommodate these rights and be so abusive and unrepresentative “that the situation is tantamount to classic colonialism.” *Id.* Erica-Irene Daes is the former Chair of the U.N. Working Group on Indigenous Populations and one of the principle architects of the U.N. Draft Declaration on the Rights of Indigenous Peoples.

245. *See Discrimination Against Indigenous Peoples, Report of the Working Group on Indigenous Population on its tenth session*, U.N. Commission on Human Rights, 44th Sess., para. 71, U.N. Doc. E/CN.4/Sub.2/1992/33 (1992) (adding that

just indigenous territorial rights; it provides the framework for the exercise of all other rights and is viewed by indigenous peoples and others as essential to their cultural survival and future development.²⁴⁶ The ICJ,²⁴⁷ most scholars,²⁴⁸ and a major U.N. study²⁴⁹ conclude that the right to self-determination is a peremptory norm of international law or *jus cogens*, and therefore, non-derogable. The extent to which the *jus cogens* aspects of the right apply beyond classic (geographically separate) colonial situations, however, is questionable.

denying these rights can lead to dangerous conflicts); see also Hector Gros Espiell, *Implementation of United Nations Resolutions Relating to the Rights of Peoples under Colonial and Alien Domination to Self-Determination*, U.N. Commission on Human Rights, 31st Sess., para. 50, U.N. Doc E/Cn.4/Sub.2/405 (1978) (stating that it has been affirmed by many documents that self-determination is a right of all peoples).

246. See generally ANAYA, *supra* note 26 (elaborating on the affect of self-determination on international law); S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 131, 147 (1993) (explaining that the world has rejected the idea of a government imposing its ideas and policies on a people regardless of their position in society); Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law*, 7 HARV. HUM. RTS. J. 33 (1994) (showing that there are still many interpretations to self-determination including democratic rights and the right to secession); Erica-Irene A. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1993) (arguing that the right of self-determination "should ordinarily be interpreted as the right of these peoples to negotiate freely their political status and representation in the States in which they live."); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660 (1990) (explaining the development of the rights of self-determination to include the rights of indigenous people to maintain their autonomous culture).

247. See generally East Timor (Port. v. Austl.), 1995 I.C.J. 102 (June 30) (stating that the right of self-determination is one of the "essential principles of contemporary international law"), at <http://www.icj-cij.org/icjwww/idecisions/isummaries/ipastsummary950630.htm>.

248. See generally BROWNIE, *supra* note 68, at 513; Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 440 (1989) (arguing that self-determination is a *jus cogens* norm for several reasons including the fact that it the first right mentioned in two important treaties).

249. See Espiell, *supra* note 245, para. 75 (noting that the idea that self-determination is a *jus cogens* norm is supported by many).

Inter-governmental agencies have, a number of times, addressed indigenous rights to lands, territories, and resources under human rights instruments of general application. For example, under Article 5 of the CERD, for instance, states-parties are obligated to recognize, respect and guarantee the right "to own property alone as well as in association with others" and the right to inherit property, without discrimination.²⁵⁰ Failure to recognize and protect indigenous property ownership and inheritance systems and rights is discriminatory and denies equal protection of the law.

In its 1997 General Recommendation, the U.N. Committee on the Elimination of Racial Discrimination elaborates on state obligations and indigenous rights under CERD.²⁵¹ In particular, the Committee called upon states-parties to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories."²⁵²

As discussed above, the prohibition of racial discrimination has acquired the status of a non-derogable, peremptory norm of international law and as one of the obligations *erga omnes*, and, as such, is binding on the Bank.²⁵³ CERD may be taken as an elaboration of the content and various aspects of the peremptory norm prohibiting racial discrimination. At a minimum, provisions of the Convention, and interpretations thereof, inform the nature and content of Bank obligations under the general norm. Aside from this, the principal provisions of CERD are declaratory of customary international law

250. See Press Release, United Nations, HR/4487 (July, 27 2000) (stating that one hundred and fifty-six States have ratified CERD as of July 2000), available at <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet> (last visited November 6, 2001).

251. See *General Recommendation XXIII Concerning Indigenous Peoples*, 51st Sess., 1235 mtg. at 2, U.N. Doc. CERD/C/51/Misc.13/Rev.4 (1997) [hereinafter *Gen. Rec. XXIII*] (calling on states to eliminate discrimination against indigenous peoples).

252. *Id.*

253. See *supra* notes 145-49 and accompanying text.

obliging the Bank to act consistently therewith.²⁵⁴ Also, over three-quarters of the Bank's membership has ratified CERD, obliging the Bank to account for and respect their attendant obligations.²⁵⁵

Article 27 of the ICCPR, provides that: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."²⁵⁶ This article protects linguistic, cultural, and religious rights, and, in the case of indigenous peoples, includes, among others, land and resource, subsistence, and participation rights.²⁵⁷ These rights are held by individuals, but exercised "in community with other members of the group," thereby providing some measure of collectivity.²⁵⁸ Similar language is found in article 30 of the U.N. Convention on the

254. See MERON, *supra* note 151, at 21 (arguing that the Convention does not preclude reservations that may be contrary to the purpose of the Convention).

255. See Press Release, *supra* note 250 (displaying the signatories of the CERD).

256. International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 27 [hereinafter International Covenant], available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

257. See *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada, Report of the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 38th Sess., Supp. No. 43, at 27, U.N. Doc. A/45/40 vol.2 (1990) [hereinafter *Ominayak*] (determining that Lake Lubicon Cree had been denied their culture due to environmental degradation and failure to protect the cultural relationship with their lands and resources); see also *Jouni Lansman v. Finland*, U.N. GAOR, Hum. Rts. Comm., 58th Sess., Communication No. 671/1995 at 13, U.N. Doc. CCPR/C/58/D/671/1995 (1995) [hereinafter *J. Lansman*] (finding that reindeer herding fit into the definition of cultural activities); *Ilmari Lansman v. Finland*, U.N. GAOR, Hum. Rts. Comm., 52nd Sess., Communications No. 511/1992 at 11, U.N. Doc. CCPR/C/52/D/511/1992 (1992) [hereinafter *I. Lansman*] (finding that limited quarrying on the slopes of one mountain did not deny the right to culture); *Ivan Kitok v. Sweden*, U.N. GAOR, Hum. Rts. Comm., 33rd Sess., Supp. No. 40, at 229, U.N. Doc. A/43/40 (1988) (finding that indigenous peoples' subsistence rights are protected by article 27); *Lovelace v. Canada*, U.N. GAOR, Hum. Rts. Comm., 36th Sess., Supp. No. 40, at 173-4, U.N. Doc. A/36/40 (1981) [hereinafter *Lovelace*] (finding that preventing a woman from moving back to the reservation interfered with her right to enjoy her own culture); *Hopu v. France*, U.N. GAOR, Hum. Rts. Comm., 60th Sess., Communications No. 549/1993 at 15, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1 (1997) (holding, not under Article 27, that destruction of an ancestral burial ground violated the rights to privacy and family life).

258. International Covenant, *supra* note 256.

Rights of the Child, therefore, the points made here are also relevant to the rights of indigenous children, and, by implication, the larger community, under that instrument.²⁵⁹ Article 30 of the U.N. Convention on the Rights of the Child and ICCPR article 27 embody one manifestation of the general norm of international law relating to the right to cultural integrity.²⁶⁰

The HRC interprets Article 27 to include the "rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong." In reaching this conclusion, the HRC recognizes that indigenous peoples' subsistence and other traditional economic activities are an integral part of their culture, and interference with those activities can be detrimental to their cultural integrity and survival. By necessity, the land, resource base, and the environment thereof also require protection if subsistence activities are to be safeguarded.

The HRC further elaborates upon its interpretation of Article 27 by stating that:

[O]ne or other aspects of the rights of individuals protected [under Art. 27]—for example to enjoy a particular culture—may consist in a way of life which is closely associated with a territory and its use of resources. This may particularly be true of members of indigenous communities constituting a minority. . . . With regard to the exercise of the cultural rights protected under Article 27, the committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specifically in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. . . . The Committee concludes that Article 27 relates to rights whose protection imposes specific

259. Convention on the Rights of the Child, Nov. 20, 1989, art. 30, U.N. Doc. A/RES/44/25 [hereinafter CRC]. One hundred and ninety-one States have ratified the CRC.

260. See Lyndel V. Prott, *Cultural Rights as Peoples' Rights in International Law*, in THE RIGHTS OF PEOPLES 93 (James Crawford ed., 1988) (asserting definitions of cultural rights in international law); S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1, 15 (1991) (discussing new international laws giving indigenous people better hopes for survival).

obligations on States parties. The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.²⁶¹

In July 2000, the HRC added that Article 27 requires that "necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands" and that "securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities . . . must be protected under Article 27."²⁶²

Although the HRC has observed that a State's freedom to encourage economic development is limited by the obligations it has assumed under Article 27, the rights the article guarantees are not absolute.²⁶³ The HRC employs a threshold test to determine if the complained of activity constitutes a *denial* of the rights protected or merely an *infringement* of those rights.²⁶⁴ This test has important implications for Bank projects as it relates to the obligations of the Bank's Members, as well as obligations of the Bank separately and in connection with obligations of its Members. An activity that amounts to a denial of the right to enjoy cultures—for indigenous peoples this includes land, subsistence, and other rights—is prohibited under Article 27 as well as under the norm of customary international law manifested therein. Such activities include forcible relocation, severe environmental degradation, and denial of access to subsistence areas and areas of cultural and religious significance.²⁶⁵

261. See *General Recommendation XXIII Concerning the Rights of Minorities*, 50th Sess., 1314 mtg., U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994) (commenting on rights of minorities under Article 27).

262. *Concluding Observations of the Human Rights Committee: Australia*, paras. 10-11, U.N. Doc. CCPR/CO/69/AUS (2000).

263. See *I. Lansman*, *supra* note 257, at 10 (reiterating that interference with cultural rights is not a violation of Article 27 unless that interference denies the exercise of those rights).

264. See *id.* (finding that measures impacting the way one lives might not deny rights under Article 27).

265. See *supra* note 257 and accompanying text (describing the types of activities that amount to a denial of the right to enjoy culture for indigenous peoples).

However, the fact that an activity does not amount to a denial of the right to enjoy culture does not mean that it may not violate a specific cultural right, for instance, the right to use and practice indigenous medicine. Such a right may be violated by denying indigenous people access to areas where certain medicinal plants are exclusively located.

Under Inter-American human rights instruments, specifically the American Convention on Human Rights, the OAS has reached similar conclusions about indigenous peoples' rights.²⁶⁶ First, it is well established in the Inter-American system that indigenous peoples have been historically discriminated against and disadvantaged and, therefore, that special measures and protections (affirmative action) are required if they are to enjoy equal protection of the law and the full enjoyment of other human rights. These special measures include protections for indigenous languages, cultures, economies, ecosystems and natural resource base, religious practices, "ancestral and communal lands," and the establishment of an institutional order that facilitates indigenous participation through their freely chosen representatives.²⁶⁷ The Inter-American Commission of Human Rights ("IACHR") characterizes the preceding as "human rights also essential to the right to life of peoples."²⁶⁸ In the negative, protection of these rights amounts to a broad prohibition of forcible assimilation and ethnocide.

According to the IACHR, indigenous peoples' property rights, including ownership, derive from their own forms of land tenure, traditional occupation, and use, and exist absent formal recognition by the state.²⁶⁹ This is consistent with aboriginal title jurisprudence in

266. See generally American Convention on Human Rights, Nov. 22, 1969.

267. See *Report on the Situation of Human Rights in Ecuador*, Inter-Am. C.H.R., OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997) [hereinafter *Ecuador Report*] (discussing special protections for indigenous lands, economies and cultures in light of petroleum drilling and environmental degradation); *Third Report on the Situation of Human Rights in The Republic of Guatemala*, Inter-Am. C.H.R., OEA/Ser.L/V/II.67, doc. 9 (1986) [hereinafter *Guatemala Report*]; *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, Inter-Am. C.H.R., OEA/Ser.L/V/II.62, doc. 10 rev. 3 (1983) [hereinafter *Miskito Report*] (showing why the Miskito people deserves special protection).

268. *Guatemala Report*, *supra* note 267.

269. See Case 11.577, Inter-Am. C.H.R., OEA/Ser.L/V/II.102, doc. 6 rev.

most common law states²⁷⁰ and with international instruments in general. The IACHR has related territorial rights on a number of occasions to cultural integrity, thereby recognizing the fundamental connection between indigenous land tenure and resource security and the right to practice, develop, and transmit culture free from unwarranted interference.²⁷¹ In 1997, for instance, the IACHR stated that:

For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers to both its capacity for providing the resources which sustain life, and to "the geographical space necessary for the cultural and social reproduction of the group."²⁷²

The IACHR reiterates this conclusion in its *Second Report on the Human Rights Situation in Peru*, stating that "Land, for the indigenous peoples, is a condition of individual security and liaison with the group. The recovery, recognition, demarcation, and registration of the lands represents essential rights for cultural survival and for maintaining the community's integrity."²⁷³ As noted above, the right to cultural integrity is a norm of customary international law binding on the Bank.

International Labor Organization Convention Number 169 ("ILO 169") contains a number of provisions on indigenous territorial rights.²⁷⁴ Article 13(1) frames the provisions that require govern-

(1999); see also PROPOSED AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES art. XVIII [hereinafter PROPOSED AMERICAN DECLARATION]. The IACHR approved this declaration in 1997.

270. See *Lipan Apache Tribe v. United States*, 180 Cl. Ct. 487, 492 (1967) (reversing decision to dismiss claims against U.S. by Indian tribes in Texas); *Roberts v. Canada* [1989] S.C.R. 322, 340 (Can.); *Wik Peoples v. Queensland & Ors.* (1996) 187 C.L.R. 1, 84 (Austl.) (1996).

271. See *Ecuador Report*, *supra* note 267 (finding special relevance to indigenous inhabitants of Ecuador).

272. *Id.*

273. *Second Report on the Situation of Human Rights in Peru*, Inter. Am. C.H.R. at Ch. X, para. 16, OEA/Ser.L/V/II.106, doc. 59 (2000); see also *Third Report on the Situation of Human Rights in Paraguay*, Inter. Am. C.H.R. at Ch. IX, para. 47, OEA/Ser.L/V/II.110 doc. 52 (2001).

274. See International Labour Organisation Convention C169, (June 27, 1989) [hereinafter ILO 169] (setting forth the rights that attach to indigenous territorial

ments to recognize and respect the special spiritual, cultural, and economic relationship that indigenous people have with their lands and territories, especially "the collective aspects of this relationship."²⁷⁵ Article 14 requires that indigenous peoples' collective "rights of ownership and possession . . . over the lands which they traditionally occupy shall be recognized" and that "[g]overnments shall take steps as necessary to identify" these lands and to "guarantee effective protection of [Indigenous peoples'] rights of ownership and possession."²⁷⁶ Article 13(2) defines the term "lands" to include "the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use."²⁷⁷

The preceding provisions on land rights must all be read in connection with Article 7(1) of the Convention which provides that:

ownership), available at <http://www.ilo.org>. As of November 2001 the following 14 states have ratified: Argentina, Bolivia, Columbia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, and Peru. *Id.* Austria and Venezuela have ratified, but have yet to transmit their instrument of ratification to the ILO. *Id.* The following states have submitted it to their national legislatures for ratification or are discussing ratification: Brazil, Chile, the Philippines, Finland, El Salvador, Russian Federation, Panama, and Sri Lanka. *Id.* Germany has adopted ILO 169 as the basis for its overseas development aid and the Asian Development Bank and the U.N.DP have incorporated some of its substance into their policies on indigenous peoples (draft policy in the case of U.N.DP). See e.g., Asian Development Bank, *The Bank's Policy on Indigenous Peoples* (1999).

275. ILO 169, *supra* note 274, art. 13.

276. *Id.* art. 14. For ILO jurisprudence on Convention 169's land and other provisions, see e.g., *Report of the Committee Set Up to Examine the Representation Alleging Non-observance by Denmark of the Indigenous and Tribal Peoples Convention*, doc. GB.277/18/3 (2000) (considering action by relocated persons claiming damages); *Report of the Committee Set Up to Examine the Representation Alleging Non-observance by Bolivia of the Indigenous and Tribal Peoples Convention*, doc. GB.272/8/1 (1998) (noting exploitation of indigenous peoples' lands by forestry industry); *Report of the Committee Set Up to Examine the Representation Alleging Non-observance by Peru of the Indigenous and Tribal Peoples Convention*, doc. GB.270/16/4 (1997) (noting special importance of cultures of peoples concerned with their interaction with lands and territories); *Report of the Committee Set Up to Examine the Representation Alleging Non-observance by Mexico of the Indigenous and Tribal Peoples Convention*, doc. GB.270/16/3 (1996) (urging the safeguard of land not exclusively occupied by indigenous peoples).

277. See ILO 169, *supra* note 274 (defining crucial terms).

The people concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.²⁷⁸

Several provisions determine the scope of the internal autonomy. Among those provisions are: the provisions on health services (Article 25(1) – “adequate health services. . . under their own responsibility and control”); education (Article 27(2)(3) – “[t]he competent authority shall ensure the training of members . . . with a view to the progressive transfer of responsibility for conduct of [educational programs]” and “the right of these peoples to establish their own educational institutions”); vocational training (Article 22(3) – “these peoples shall progressively assume responsibility for the organization and operation of such special training programs”); and especially to those concerning lands and territories (Article 13-19) and Indigenous institutions (Articles 7(1), 8(2) and 9).²⁷⁹

ILO 169's predecessor, ILO 107, adopted in 1957, also provides that “[t]he right of ownership, collective or individual, of the members of the population concerned over the lands which these populations traditionally occupy shall be recognized.”²⁸⁰ In interpreting this article in a complaint involving tribal people in India, the ILO committee of experts held that the rights that attach under Article 11 also apply to lands presently occupied, irrespective of immemorial possession or occupation.²⁸¹ India unsuccessfully argued that the phrase “traditionally occupy” limits compensable land rights to groups which can demonstrate immemorial possession.²⁸² The ILO Committee stated that because the people had some form of relationship with land presently occupied, even if only for a short time, this rela-

278. *Id.*

279. *Id.*

280. International Labour Organisation Convention C107, Indigenous and Tribal Population Convention, June 26, 1957, art. 11, available at <http://ilolex.ilo.ch:1567/scripts/> [hereinafter ILO 107].

281. *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III(4A), at 287, International Labour Conference, Sess. 75, Geneva 1988.

282. *Id.*

tionship was sufficient to form an interest and, therefore, rights to that land and the attendant resources.²⁸³ Twenty-seven States have ratified ILO, many of them in Asia and Africa, including Brazil and India, two of the Bank's major borrowers.²⁸⁴

Article 14 of the African Charter on Human and Peoples' Rights guarantees property rights, while Articles 3 and 19 guarantee equal protection of the law for individuals and peoples and Article 2 prohibits discrimination.²⁸⁵ Relying on U.N. and IACHR jurisprudence, these provisions read together amount to a recognition of indigenous property rights based upon traditional occupation and use.²⁸⁶

Articles 19 through 24 of the African Charter set out the rights of peoples, including the right to self-determination, the right to freely dispose of natural wealth, and the right to a satisfactory environment.²⁸⁷ There is little clarity, however, about who are the holders of peoples' rights, especially whether sub-state entities such as indigenous peoples are beneficiaries. In some cases, the African Commission on Human and Peoples' Rights has found that peoples' rights only attach to the entire population of independent states, in others, to sub-state entities within those independent states.²⁸⁸ The African Commission recently established a Working Group on Indigenous Peoples with a mandate to assess indigenous rights in relation to the right to self-determination and other rights which may provide further guidance on this issue.²⁸⁹

283. *Id.*

284. ILO 107, *supra* note 280.

285. See AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS arts. 2, 3, 14, 19 (guaranteeing the specified rights).

286. See *id.* (incorporating property rights and equal protection into the African Charter on Human and Peoples' Rights).

287. See *id.* arts. 19-24.

288. Compare *Resolution on the Situation in Rwanda: Seventh Activity Report of the African Commission on Human and Peoples' Rights*, ACHPR/APT/7th, Annex XII, para. 2 (referring to "all the Peoples of Rwanda when calling for special attention to Rwanda's human rights situation") with Richard N. Kiwanuka, *The Meaning of "People" in the African Charter on Human and Peoples' Rights*, 82 AM. J. INT'L L. 80 (1988) (arguing that the definition of "people" as used in the African Charter on Human and Peoples' Rights is contrary to one of popular sovereignty).

289. See *African Commission on Human and Peoples' Rights: Resolution on the*

Recent normative developments relating to indigenous lands, territories, and resources are expansive, requiring legal recognition, restitution, and compensation; protection of the total environment thereof; and various measures of participation in extra-territorial activities that may affect subsistence rights and environmental and cultural integrity.²⁹⁰ Article 26 of the U.N. Draft Declaration, for instance, provides that:

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal sea, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by states to prevent any interference with, alienation or encroachment upon these rights.²⁹¹

The OAS Proposed Declaration also provides a substantial measure of protection. Article XVIII states:

1. Indigenous peoples have the right to the legal recognition of the various and specific forms of control, ownership and enjoyment of territories and property.
2. Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories, and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.

Rights of Indigenous People/Communities in Africa, (2000) (on file with author). The mandate of the Working Group is described in the resolution as to:

examine the concept of indigenous people and communities in Africa; study the implications of the African Charter on Human Rights and well being of indigenous communities especially with regard to: the right to equality (articles 2 and 3) the right to dignity (article 5) protection against domination (article 19) on self-determination (article 20) and the promotion of cultural development and identity (article 22); [and to] consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities.

Id.

290. See *U.N. Draft Declaration*, *supra* note 240 (setting standards for indigenous peoples' rights, including the right to self-determination, protection of territorial rights and subsistence rights).

291. *Id.* art. 26.

3. Where property and user rights of indigenous peoples arise from rights existing prior to the creation of those states, the states shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptible and indefeasible.[This shall not limit] the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights over them.

4. Indigenous peoples have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage, and conserve such resources.²⁹²

As evident from the preceding, human rights standards, as set out in treaties, in jurisprudence interpreting those treaties, and in emerging standards, all require that countries recognize and respect indigenous ownership rights, at a minimum, over lands traditionally occupied. All that OP 4.10 requires is that Borrowers consider doing so.²⁹³ This discretion is clear from paragraph 20, which permits the Bank to provide technical assistance, “[a]t the Borrower’s request,” to “establish legal recognition of the customary or traditional land tenure systems of indigenous peoples, or grant long-term renewable rights of custodianship and use.”²⁹⁴ This is not only inconsistent with human rights standards, it is also entirely inconsistent with the Bank’s views on the centrality of property rights to overall development and poverty alleviation efforts.²⁹⁵ On these grounds alone, it is difficult to see how the Bank can justify this approach.

OP 4.10 paragraphs 12 and 13 may not even comply with the Convention on Biological Diversity (“CBD”), a binding international environmental treaty.²⁹⁶ As noted above, two Bank policies (Forests

292. PROPOSED AMERICAN DECLARATION, *supra* note 269.

293. WORLD BANK, THE WORLD BANK OPERATIONAL MANUAL, DRAFT OPERATIONAL POLICIES (OP 4.10), para. 9 (Mar. 23, 2001) [hereinafter DRAFT OP 4.10] (outlining regulations for consultation and participation), available at <http://lnweb18.worldbank.org/essd/essd.nsf/28354584d9d97c29852567cc00780e2a/fe699bec4e64a1ef85256a6b0080b5d7?OpenDocument> (last visited Nov. 10, 2001).

294. *Id.* para. 20.

295. See *supra* notes 39-43 and accompanying text (detailing the role of social development).

296. Compare DRAFT OP 4.10, *supra* note 293, with Convention on Biological

and Environmental Assessment) require that the Bank not finance projects that contravene their Members' obligations under international environmental treaties.²⁹⁷ Footnote one to OP 4.10 states that it should be read together with other relevant Bank policies and specifically mentions the policies on Forests and Environmental Assessment, as well as OP 4.04 on Natural Habitats discussed below.²⁹⁸

Article 10(c) of the CBD provides that States shall "protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements."²⁹⁹ Although the precise scope and meaning of this article has yet to be formally articulated, it will most likely include indigenous agriculture, agro-forestry, hunting, fishing, gathering and use of medicinal plants and other subsistence activities. This article, by implication, should also be read to include a certain measure of protection for the ecosystem and environment in which those resources are found. The analyses of the Secretariat of the CBD supports these observations on Article 10(c). In "Traditional Knowledge and Biological Diversity," the Secretariat said the following about the language "protect and encourage" found in 10(c):

In order to protect and encourage, the necessary conditions may be in place, namely, security of tenure over traditional terrestrial and marine estates; control over and use of traditional natural resources; and respect for the heritage, languages and cultures of indigenous and local communities, best evidenced by appropriate legislative protection (which includes protection of intellectual property, sacred places, and so on). Discussions on these issues in other United Nations forums have also dealt with the issue of respect for the right to self-determination, which is often interpreted to mean the exercise of self-government.³⁰⁰

Diversity (June 5, 1992), available at <http://www.biodiv.org/doc/legal/cbd-en.pdf> (last visited Nov. 10, 2001).

297. See *supra* notes 102 and 203 (setting forth the requirement to avoid conflict with members' responsibilities under international law and environmental agreements).

298. See DRAFT OP 4.10, *supra* note 293, at n.1.

299. Convention on Biological Diversity, art. 10(c) (June 5, 1992), available at <http://www.biodiv.org/doc/legal/cbd-en.pdf> (last visited Nov. 10, 2001).

300. *Traditional Knowledge and Biological Diversity*, U.N.EP/CBD/TKBD/1/2, at 23 (1997).

Finally, Anaya and Williams state that “the relevant practice of states and international institutions establishes that, as a matter of customary international law, states must recognize and protect indigenous peoples’ rights to land and natural resources in connection with traditional or ancestral use and occupancy patterns.”³⁰¹ These land and resource rights include ownership rights. While there is no authoritative judicial or quasi-judicial confirmation of this conclusion,³⁰² a very persuasive case can be made in support of it, especially if one also views state practice in the context of their international statements and conduct. Moreover, Anaya and Williams are not alone among scholars in reaching this conclusion.³⁰³ Should recognition and respect of indigenous land and resource rights be confirmed as part of customary international law in their own right, the Bank will be bound to respect these rights. As it stands now, customary international law protects these rights in connection with the principal provisions of CERD.

2. Consent, Participation, and Consultation

OP 4.10 employs the terms, “consultation”, “meaningful consultation,” involvement, and, in one place, agreement, the latter signifying consent.³⁰⁴ These terms are scattered throughout the text and appear to be used inconsistently so that it is difficult to ascertain with any certainty which standard is to be used in what context.³⁰⁵ Paragraph

301. S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples’ Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 55 (2001) (arguing that the Inter-American human rights system protects lands and resources of indigenous peoples).

302. The Inter-American Commission on Human Rights made this argument in a case recently decided by the Inter-American Court of Human Rights. See *Mayagna Awas Tingni Community Case*, Inter-American Court on Human Rights, Series C. No. 79, Judgment of 31 August 2001, available at http://www.corteidh.or.cr/serie_c/Sentencia.html. The Court, however, did not address this issue in its judgment, but based protection of indigenous land rights on Articles 1, 2, and 21 of the American Convention on Human Rights read in conjunction with United Nations instruments protecting indigenous rights. *Id.* para. 141.

303. See *supra* note 26 and accompanying text.

304. See, e.g., DRAFT OP 4.10, *supra* note 293, paras. 8-10, 16.

305. See *id.*

7, for instance, provides that Bank-assisted operations require “[m]eaningful consultation” and mechanisms “to foster the informed participation” of indigenous peoples.³⁰⁶ Paragraph 9, entitled “Consultation and Participation” mentions only “meaningful consultation” and “consultation.”³⁰⁷ Further, paragraph 10 specifies that projects, either identified as having adverse effects or specially designed to benefit indigenous peoples, require “informed participation,” however, its sub-paragraphs detailing processing requirements simply require that activities be undertaken “in consultation” with indigenous peoples.³⁰⁸ For potentially damaging resource exploitation operations, the OP requires consultation and that indigenous peoples be involved in decision making,³⁰⁹ for activities pertaining to parks and protected areas affecting customary usufruct rights, informed participation is required;³¹⁰ and, for exploitation of cultural resources, consent is required.³¹¹

Irrespective of which standard applies, pursuant to paragraph 9, the Borrower merely “considers the views and preferences of indigenous peoples” when deciding to move ahead with the project and in determining if any project modifications are necessary.³¹² The Bank then has the dubious task of determining if the Borrower’s judgment is consistent with the policy as a whole.³¹³

Rather than examine each of the paragraphs mentioned above, I will confine my comments to paragraph 14. As with the paragraphs discussed in the preceding section, paragraph 14 also falls short of human rights standards. It reads:

Commercial Use of Lands and Resources. When Bank-assisted projects involve the commercial exploitation of natural resources (including forests, mineral, and hydrocarbon resources) on lands owned, or customarily used by indigenous groups, the Borrower:

306. *Id.* para. 7 (outlining policy regulations).

307. *Id.* para. 7 (outlining policy regulations).

308. *Id.* para. 10 (dealing with project design).

309. *Id.* para. 14 (dealing with commercial use and resources).

310. DRAFT OP 4.10, *supra* note 293, para. 15.

311. *Id.* para. 16.

312. *Id.* para. 9.

313. *Id.*

- (a) informs these groups of their rights to such resources under statutory and customary law;
- (b) informs them of the potential impacts of such projects on their livelihoods, environments and use of natural resources;
- (c) consults them at an early stage on the development of the project, and involves them in decisions which affect them; and
- (d) provides them with opportunities to derive benefits from the project.

As in all projects which affect indigenous groups, adverse impacts upon them are avoided or minimized, and benefits should be culturally appropriate.³¹⁴

Paragraph 14 defines procedural mechanisms the Bank will employ when financing resource exploitation on indigenous lands, in this case defined as lands both owned and customarily used.³¹⁵ I will focus here only on sub-paragraph (c), except to say that sub-paragraph (d) is substandard as international standards *require* that indigenous peoples share in benefits derived from exploitation of resources pertaining to their lands and that compensation be rendered for any related damages.³¹⁶ The OP requires neither, although compensation may be provided for under domestic law and procedures.

Sub-paragraph (c) requires that consultation take place “at an early stage” in project development and that indigenous peoples be involved in decision-making.³¹⁷ Apart from it being unclear when exactly is “an early stage” of the project and why consultation should not take place from inception, consulting with and involving indigenous peoples is clearly substandard. Different human rights instruments and bodies have employed different standards.³¹⁸ These standards range from free and informed consent to effective, meaningful, or informed participation to good faith consultation aimed at

314. *Id.* para. 14.

315. DRAFT OP 4.10, *supra* note 293, para. 14.

316. See ILO 169, *supra* note 274, art. 15(2) (requiring either participation in or compensation for use of mineral or sub-surface resources); PROPOSED AMERICAN DECLARATION, *supra* note 269, art. XVIII(5) (requiring compensation for exploitation of minerals and subsoil resources).

317. DRAFT OP 4.10, *supra* note 293, para. 14(c).

318. Compare *id.* with ILO 169, *supra* note 274 (demonstrating the different standards employed by the two instruments).

achieving agreement or consent.³¹⁹ Regardless, they all surpass the standard set in the OP.

The 1997 General Recommendation, issued by the Committee on the Elimination of Racial Discrimination, for instance, called upon states-parties to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent."³²⁰ The Committee later recognized indigenous peoples' right to "effective participation . . . in decisions affecting their land rights, as required under article 5(c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of ensuring the 'informed consent' of indigenous peoples."³²¹ Article 30 of the U.N. Draft Declaration is consistent with this:

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that states obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.³²²

Similarly, finding that Nicaragua violated the right to property, judicial protection, and due process by granting logging concessions on indigenous lands without taking steps to title and demarcate those lands, the IACHR held that:

The State of Nicaragua is responsible for violations of the right to property, embodied in Article 21, by granting a concession to SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community.³²³

319. *Id.*

320. *Gen. Rec. XXIII, supra* note 251, at 1 (calling for elimination of discrimination against indigenous peoples).

321. *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, 56th Sess., para. 9, U.N. Doc. CERD/C/304/Add.101 (2000) (expressing concern for indigenous peoples of Australia whose protection might be reduced)(emphasis added).

322. *U.N. Draft Declaration, supra* note 240.

323. *Judgement on the Preliminary Objections of February 1, 2000*, Inter-Am. C.H.R., report no. 27/98, Ser. C no. 66 (2000).

While not requiring consent, ILO 169 requires that the state "establish or maintain procedures through which [it] shall consult these peoples" to determine the extent to which "their interests would be prejudiced" prior to engaging in, or allowing, resource exploitation.³²⁴ This provision should be read consistently with the general requirement of Article 6(2) that consultation be undertaken "in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent."³²⁵ Article XVIII(5) of the Proposed OAS Declaration provides that states "must establish or maintain procedures for the participation of the peoples concerned in determining whether the interests of these peoples would be adversely affected and to what extent, before undertaking or authorizing" operations on indigenous lands.³²⁶ Also, the HRC has found that respect for Article 27 of the ICCPR includes "measures to ensure the effective participation of members of minority communities in decisions which affect them."³²⁷

To be consistent, the OP must, at a minimum, require indigenous peoples' effective or meaningful participation. Furthermore, as interpretations of CERD carry additional weight, given the status attributed to the norm prohibiting racial discrimination, the policy should comply with the standard set by the Committee: ensuring effective participation and informed consent. Inclusion of such a low standard is extremely disturbing given the history of severe problems that indigenous peoples have experienced with resource exploitation.³²⁸ It is no coincidence that the majority of complaints filed by indigenous peoples with intergovernmental human rights bodies concern the negative impact of these activities and attendant human rights viola-

324. See ILO 169, *supra* note 274, art. 15(2) (requiring either participation in or compensation for use of mineral or sub-surface resources).

325. *Id.* art. 6(2) (requiring good faith for consultations regarding application of Convention).

326. PROPOSED AMERICAN DECLARATION, *supra* note 269, art. XXVIII(5).

327. *General Comment No. 23 (50) art. 27*, at 4, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994) (calling for protection of the participation of minorities in community activities). See also *I. Lansman*, *supra* note 257.

328. See *Gen. Rec. XXIII*, *supra* note 251 (finding the need to remedy past and continuing discrimination against indigenous peoples).

tions.³²⁹ The Bank must require a strong, effective, and verifiable participation/consent standard, especially given its failure in the past to ensure that participation did in fact occur—recall the internal Bank study noted above that found that only half of Bank projects between 1992-97 involved consultation with indigenous authorities about project design and implementation.³³⁰

Some areas of indigenous lands are exempt from resource exploitation by virtue of another Bank policy: OP 4.04 on Natural Habitats.³³¹ According to footnote one in OP 4.10, the two policies “should” be read concurrently.³³² OP 4.04 states that “[t]he Bank does not support projects that, in the Bank’s opinion, involve the significant conversion or degradation of critical natural habitats,”³³³ In OP 4.04, the Bank defines “critical natural habitats” as:

[E]xisting protected areas and areas officially proposed by government as protected areas (e.g. reserves that meet the criteria of the World Conservation Union [IUCN] classifications) *areas initially recognized as protected by traditional local communities (e.g., sacred groves) and sites that*

329. See *Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur*, Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994) (recommending inclusion of communications on ecological matters in ongoing studies.) This followed the Special-Rapporteur’s conclusion in her preliminary report that, given indigenous peoples’ unique relationship with their lands and territories, “all environmental degradation has a direct impact on the human rights of the indigenous peoples dependent on that environment.” *Preliminary Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, Pursuant to Sub-Commission Resolutions 1990/7 and 1990/27*, Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, 43rd Sess. Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/1991/8 (1991).

330. See GRIFFITHS & COLCHESTER, *supra* note 203, at 15 (discussing consultation between the Bank and indigenous peoples).

331. See generally WORLD BANK, THE WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICIES, OP 4.04 (June 2001) [hereinafter OP 4.04] (outlining the Bank’s Operational Policies toward the conservation of natural habitats), available at <http://wbln0018.worldbank.org/institutional/manuals/opmanual.nsf/whatnewvirt/71432937fa0b753f8525672c007d07aa?opendocument> (last visited Nov. 11, 2001).

332. DRAFT OP 4.10, *supra* note 293, n.1.

333. OP 4.04, *supra* note 331, para. 4.

maintain conditions vital for the viability of these protected areas (as determined by the environmental assessment process). . . .³³⁴

Assuming the Bank adheres to—not to mention properly understands and applies in practice—this provision, it should provide some measure of protection for indigenous lands. How much remains to be seen, particularly when viewed in competition with often lucrative state, and/or multinational, led resource exploitation operations.

3. *Involuntary Resettlement*

While previous drafts of OP 4.10 addressed the issue of involuntary resettlement in some detail,³³⁵ the present draft makes only one

334. WORLD BANK, THE WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICIES, OP 4.04—ANNEX A, para. 1(b)(i) (June 2001), *available at* <http://wbln0018.worldbank.org/institutional/manuals/opmanual.nsf/whatnewvirt/5d9dc9aef681ba5e8525672c007d07ab?opendocument> (last visited Nov. 11, 2001).

335. See Draft OP 4.10, *supra* note 293, paras. 17-20. Paragraphs 17 through 20 state:

17. The policy of the Bank is to avoid involuntary relocation of indigenous people, or in exceptional cases where it is unavoidable, to minimize it, exploring all viable alternative project designs. When resettlement activities take place in Bank-financed projects, they are conceived and executed as development programs, offer opportunities for displaced peoples to participate in their planning and implementation and assist displaced persons in their efforts to improve their livelihoods and standards of living or at least to restore them. To achieve these objectives, the Bank pays particular attention to the needs of vulnerable groups including indigenous peoples.

18. When resettlement of indigenous people is unavoidable, the results of the social assessment, and the proposed mitigation measures should be consistent with the objectives of this policy and with those of the Bank's Policy on *Involuntary Resettlement* (OP 4.12). If questions arise, the project should be referred to the Bank's Social Safeguard Policies Committee for guidance on further processing of the project.

19. Indigenous peoples displaced from land based livelihoods are provided with an option of replacement land acceptable to them.

20. In cases where livelihoods of indigenous peoples are adversely affected due to restrictions imposed on their access to legally designated parks and protected areas, they should be assisted in their efforts to improve or at least restore their livelihoods in a manner that maintains the sustainability of the respective parks and protected areas and is compatible with their culture and ways of life. In such cases, the borrower prepares a process framework acceptable to the Bank, as described in the Policy on *Involuntary Resettlement* (OP 4.12, Paragraph 6)).

reference in a footnote to the issue.³³⁶ Draft OP 4.12 on Involuntary Resettlement is therefore the primary reference point.³³⁷ I will deal with it here for two reasons. First, it illustrates a major deficiency in OP 4.10: its failure to address an issue of vital importance in the larger scheme of indigenous peoples' human rights. Second, it permits analysis of another Bank policy on human rights grounds providing further insight into the overall treatment of indigenous rights in Bank policies.

International attention has focused on the issue of involuntary resettlement in recent years, more than at any other time; it "is considered a practice that does grave and disastrous harm to the basic civil, political, economic, social and cultural rights of large numbers of people, both individual persons and collectivities."³³⁸ A Bank study on resettlement also recognizes this, stating that "[t]he potential for violating individual and group rights under domestic and international law makes compulsory resettlement unlike any other project activity Carrying out resettlement in a manner that respects the rights of affected persons is not just an issue of compliance with the law, but also constitutes sound development practice."³³⁹

Forcible relocation can be disastrous for indigenous peoples, severing entirely their various relationships with their ancestral lands.³⁴⁰ As observed by the U.N. Sub-Commission, "where population transfer is the primary cause for an indigenous people's land loss, it con-

336. See DRAFT OP 4.10, *supra* note 293, at n.6 (noting briefly that indigenous people are subject to resettlement plans pursuant to the Bank's policies).

337. See generally DRAFT OP 4.12, *supra* note 207 (defining the Bank's Operational Policies with respect to involuntary resettlement).

338. *von Boven Report*, *supra* note 151, at 10. See also FORCED EVICTIONS, *supra* note 14, paras. 62-72; *Report of the Representative of the Secretary-General, Mr. Francis Deng, Submitted Pursuant to Commission on Human Rights Resolution 1997/39, Addendum, Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, U.N. Economic and Social Council, Commission on Human Rights, 54th Sess., Agenda Item 9(d), §§ I.A-I.G, U.N. Doc. E/CN.4/1998/53/Add.1 (1998) [hereinafter *Deng Report Addendum*] (enumerating the various human rights implicated by resettlement).

339. RESETTLEMENT AND DEVELOPMENT, *supra* note 7, at ¼.

340. See generally Marcus Colchester, *Dams, Indigenous Peoples and Ethnic Minorities*, INDIGENOUS AFFAIRS 1999, at 4-55 (providing an extensive overview of the impact on indigenous peoples of relocation caused by dams).

stitutes a principal factor in the process of ethnocide;"³⁴¹ and, "[f]or indigenous peoples, the loss of ancestral land is tantamount to the loss of cultural life, with all its implications."³⁴² Other U.N. documents also describe this as ethnocide.³⁴³

Draft OP 4.12 recognizes the connection between resettlement and indigenous peoples' cultural integrity, stating in paragraph 9 that:

Bank experience has shown that resettlement of indigenous peoples with traditional land-based modes of production is particularly complex and may have significant adverse impacts on their cultural survival. For this reason, the Bank satisfies itself that the borrower has explored all viable alternative project designs to avoid physical displacement of these groups. Where it is not feasible to avoid such displacement, preference is given to land-based resettlement strategies for these groups that are compatible with their cultural preferences and are prepared in consultation with them.³⁴⁴

Rather than prohibit involuntary resettlement as a gross violation of indigenous peoples' rights to, among others, cultural integrity and survival, the Bank will finance activities involving resettlement, even resulting in significant adverse impacts on their cultural survival, if it is satisfied that all feasible project design alternatives are explored by the Borrower.³⁴⁵ Paragraph 2(b) of draft OP 4.12 adds that "[d]isplaced persons should be meaningfully consulted and have op-

341. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, THE HUMAN RIGHTS DIMENSIONS OF POPULATION TRANSFER, INCLUDING THE IMPLANTATION OF SETTLERS; PRELIMINARY REPORT PREPARED BY MR. A.S. AL-KHASAWNEH AND MR. R. HATANO, 45th Sess., Agenda Item 8, para. 101, U.N. Doc. E/CN.4/Sub.2/1993/17* (1993) [hereinafter AL-KHASAWNEH REPORT].

342. *Id.* para. 336.

343. See U.N. Draft Declaration, *supra* note 240, art. 7 ("Indigenous Peoples have the collective and individual right not to be subjected to ethnocide or cultural genocide, including prevention of and redress for: . . . (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights.").

344. DRAFT OP 4.12, *supra* note 207.

345. *Id.* para. 6 (detailing the Bank's required measures concerning the preparation of a resettlement plan or resettlement policy framework).

portunities to participate in planning and implementing resettlement programs."³⁴⁶ Despite the language of the Bank report quoted above, highlighting respect for the rights of affected persons, OP 4.12 stands in sharp contrast to indigenous peoples' rights as defined by international law. Two immediate concerns are the failure to require that consent be obtained prior to relocation and the complete disregard for indigenous peoples' cultural rights.

Due to the importance attached to indigenous cultural, spiritual, and economic relationships to land and resources, international law treats relocation as a serious human rights issue.³⁴⁷ International instruments employ strict standards of scrutiny and require that indigenous peoples' free and informed consent be obtained.³⁴⁸ Relocation may only be considered as an exceptional measure in extreme and extraordinary cases. Implicit in these standards is the statement that forcible relocation is prohibited as a "gross violation of human rights."³⁴⁹ The report of the Representative of the U.N. Secretary-

346. DRAFT OP 4.12, *supra* note 207, para. 2(b).

347. U.N. ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES; RELIGIOUS FREEDOM OF INDIGENOUS PEOPLES, SUB-COMMISSION RESOLUTION 1996/36, para. 5, E/CN.4/Sub.2/RES/1996/36 (1996) (mandating, for instance, the Special-Rapporteur on Religious Intolerance to include indigenous land rights within in his or her reports on state compliance with the Declaration on the Elimination of All Forms of Religious Intolerance, and inviting the Special-Rapporteur to "take into account the spiritual relationship that indigenous communities have with the land and the significance of traditional lands for the practice of their religion, and to examine the history of events which are responsible for the violation of these communities' right to freedom of religion and religious practice.").

348. See ILO 107, *supra* note 280, art. 12; ILO 169, *supra* note 274, art. 16(2); U.N. Draft Declaration, *supra* note 240, art. 10; PROPOSED AMERICAN DECLARATION, *supra* note 269, art. XVIII(6); *Gen. Rec. XXIII*, *supra* note 251, para. 5 (regarding the standards and policies international organizations use with respect to indigenous peoples).

349. *Forced Evictions, Commission on Human Rights Resolution 1993/77*, U.N. Economic and Social Council, Commission on Human Rights, para. 1, E/CN.4/RES/1993/77 (1993) [hereinafter *Resolution 1993/77*] (urging governments: to undertake immediate measures, at all levels, aimed at eliminating the practice; to offer legal security of tenure on all persons currently threatened with forced eviction; and to adopt all necessary measures giving full protection against forced eviction, based upon effective participation, consultation, and negotiation with affected persons or groups).

General on this issue concludes that "an express prohibition of arbitrary displacement is contained in humanitarian law and in the law relating to indigenous peoples,"³⁵⁰ and:

Efforts should be made to obtain the free and informed consent of those to be displaced. Where these guarantees are absent, displacement would be arbitrary and therefore unlawful. Special protection should be afforded to indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands."³⁵¹

Another report finds that the principle of consent has obtained the status of a binding general principle of international law.³⁵² Finally, the IACHR has found that "[t]he preponderant doctrine" holds that the principle of consent is of general application to cases involving relocation.³⁵³

From the preceding, it is clear that international law requires the obtainment of consent prior to resettlement and that this is a principle of customary international law binding on the Bank. It is also clear that international law accords indigenous peoples, given their unique connection with their lands and resources, a higher standard of protection than applies to others. This higher standard in part entails a substantial, if not complete, limitation on the exercise of eminent domain powers by the state. For these reasons, the European Union, the Inter-American Development Bank, and the World Commission on Dams all prohibit relocation absent indigenous peoples' consent.³⁵⁴ The Bank itself was heavily involved in the creation of the

350. *Internally Displaced Persons, Report of the Representative of the Secretary-General, Mr. Francis Deng, Submitted Pursuant to Commission on Human Rights Resolution 1997/39*, U.N., Economic and Social Council, Commission on Human Rights, 54th Sess., Agenda Item 9(d), § I.A, para. 2, U.N. Doc. E/CN.4/1998/53 (1998).

351. *Id.* § I.A, para. 4.

352. *See Deng Report Addendum, supra* note 338, § IV, para. 4 (detailing how the principle of consent has achieved the status as a general principle of international law).

353. *See Miskito Report, supra* note 267, at 120 (establishing that relocation of Indigenous peoples may be valid if accomplished with their consent).

354. *See* EUROPEAN UNION, COUNCIL OF MINISTERS, COUNCIL RESOLUTION OF 30 NOVEMBER 1998, INDIGENOUS PEOPLES WITHIN THE FRAMEWORK OF THE DEVELOPMENT COOPERATION OF THE COMMUNITY AND THE MEMBER STATES, para.

World Commission on Dams.³⁵⁵

Again, given the fundamental physical, cultural, spiritual, and other relationships that indigenous peoples have with their lands and resources, forcible resettlement amounts to a gross violation of a se-

5 (1998) (clarifying the European Union's position on the relocation of indigenous peoples, and stating "indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their additional areas"), available at [http:// europa.eu.int/ comm/ development/ lex/ en/ pdf/res_98_indigen.pdf](http://europa.eu.int/comm/development/lex/en/pdf/res_98_indigen.pdf) (last visited Nov. 11, 2001); INTER-AMERICAN DEVELOPMENT BANK, INVOLUNTARY RESETTLEMENT: OPERATIONAL POLICY AND BACKGROUND PAPER, OPERATIONAL POLICY OP-710 § IV, para. 4 (1998) [hereinafter OP-710], available at <http://www.iadb.org/sds/doc/928eng.pdf> (last visited Nov. 11, 2001). OP-170 established the Inter-American Development Bank's policy on involuntary resettlement of indigenous peoples, and asserted that:

Those indigenous and other low-income ethnic minority communities whose identity is based on the territory they have traditionally occupied are particularly vulnerable to the disruptive and impoverishing effects of resettlement. They often lack formal property rights to the areas on which they depend for their subsistence, and find themselves at a disadvantage in pressing their claims for compensation and rehabilitation. The Bank will, therefore, only support operations that involve the displacement of indigenous communities or other low-income ethnic minority communities in rural areas, if the Bank can ascertain that: the resettlement component will result in direct benefits to the affected community relative to their prior situation; customary rights will be fully recognized and fairly compensated; compensation options will include land-based resettlement; and the people affected have given their *informed consent* to the resettlement and compensation measures.

Id. (emphasis added). See also WORLD COMMISSION ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING, THE REPORT OF THE WORLD COMMISSION ON DAMS 112 (2000) ("The scope of international law has widened and currently includes a body of conventional and customary norms concerning indigenous peoples, grounded on self-determination. In a context of increasing recognition of the self-determination of indigenous peoples, the principle of free, prior, and informed consent to development projects and plans affecting these groups has emerged as the standard to be applied in protecting and promoting rights in the development process."). See also *id.* at 267, 271, 278 (establishing guidelines of gaining public acceptance during different stages of the application of strategic priorities process, i.e., having indigenous peoples give their free, prior, and informed consent to the project designed).

355. See Press Release, Berne Declaration, NGOs Protest Against World Bank Position on World Dams Report (Mar. 3, 2001) (explaining that despite its substantial involvement in and praise for the multi-stakeholder approach adopted by the World Commission on Dams, the Bank has refused to adopt its recommendations, which is a move heavily criticized by NGOs and others involved), available at http://www.evb.ch/index.cfm?page_id=551&yy=2001 (last visited Nov. 11, 2001).

ries of human rights cumulatively defined as cultural integrity.³⁵⁶ It certainly amounts to a violation of Article 27 of the ICCPR and Article 30 of the Convention on the Rights of the Child in that it is a *denial* of the right of indigenous persons and children, respectively, to enjoy their culture.³⁵⁷ Articles 27 and 30 are one manifestation of the general norm of international law relating to the right to cultural integrity, a norm binding on the Bank.³⁵⁸ Also, in the jurisprudence of the IACHR, forcible relocation equals a violation of human rights "essential to the right to life of peoples."³⁵⁹

The paragraphs of OP 4.12 requiring compensation and provision of lands of equal value do not alter the conclusion reached in the preceding paragraph.³⁶⁰ Commenting on forcible relocation, Sharon Venne, an indigenous lawyer, states that:

Does no one realize that our relationship to the land is to a particular place? There seems to be an assumption that any land will be adequate. In our worldview, the land which identifies us does not change like the wind. Removing us from our land base is, in fact, to take away our life force.³⁶¹

With regard to compensation, a U.N. report concludes that "[m]onetary compensation for relocating indigenous peoples raises a number of very difficult questions. Past experience has demonstrated that monetary compensation is actually an effective contribution to the demise of entire indigenous peoples and has resulted in the impoverishment and marginalization of most tribal and indigenous peo-

356. *Resolution 1993/77*, *supra* note 349, para. 1.

357. *See generally Ominayak, Lovelace, I. Lansman, and J. Lansman, supra* note 257 (exemplifying violations of Article 27 of the ICCPR).

358. *See Anaya, supra* note 260, at 15-19 (discussing cultural integrity of indigenous peoples as it relates to Article 27). *See generally* Lyndel V. Prott, *Cultural Rights as Peoples Rights in International Law*, in *THE RIGHTS OF PEOPLES* 93 (J. Crawford ed., 1988) (defining cultural rights and explaining their relation to Article 27).

359. *Guatemala Report, supra* note 267.

360. DRAFT OP 4.12, *supra* note 207, paras. 9-11 (discussing measures for providing land or cash compensation to relocated peoples).

361. S. Venne, *The New Language of Assimilation: A Brief Analysis of ILO Convention No. 169*, 11 *WITHOUT PREJUDICE: EAFORD INT'L REV. OF RACIAL DISCRIMINATION* 53, 63.

ples thus relocated.”³⁶² The report cites a World Bank study to reach this conclusion.³⁶³

In light of the preceding, the Bank’s statement to the U.N. World Conference Against Racism, held in South Africa in 2001, comes as a surprise. Presented by a Bank Vice-President, the statement read in part that:

Culture, for example, was once thought to be little more than a novel endowment that history gave each people – their language, their art and traditions. We now know better. We know that culture is the fertile field necessary for both individual inspiration and common ventures. It is a precondition of productivity and progress. For no person will work beyond mere sustenance without a reason, a larger cause, or a dream. Culture supplies those. A carpenter can build a house, but it takes culture to make a home. That is why we have put strong safeguards in our policies to protect indigenous cultures. We recognize that each culture is a priceless tapestry of history that cannot be replaced. It must be preserved and respected, especially in this era of globalization³⁶⁴

To conclude this section, the Bank’s draft policy on Involuntary Resettlement directly contravenes at least two norms of customary international law. These norms are binding on the Bank, requiring at a minimum that Bank polices account for and respect them. The damage caused to indigenous peoples by involuntary resettlement is by its nature irreparable and therefore must be avoided at all costs. By failing to address this issue, OP 4.10 again falls far short of ensuring that the “development process fosters full respect for the dignity, human rights and cultures of indigenous peoples.”³⁶⁵

362. AL-KHASAWNEH REPORT, *supra* note 341, para. 259.

363. *Id.* para. 259 (citing THE WORLD BANK, SOCIAL ISSUES ASSOCIATED WITH INVOLUNTARY SETTLEMENT IN BANK-FINANCED PROJECTS, OPERATIONAL MANUAL STATEMENT 2.33, para. 19 (February 1980)).

364. Mats Karlsson, Remarks at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Sept. 2, 2001), *at* <http://www.worldbank.org/html/extdr/extme/mksp090201.htm> (last visited Nov. 11, 2001).

365. DRAFT OP 4.10, *supra* note 293, para. 1.

CONCLUDING REMARKS

This paper has addressed two primary issues: the juridical theories under which the Bank may, and indeed does, have legal obligations to account for and respect human rights as the latter apply to its internal and external policies and operations; and the compatibility of its draft Operational Policy 4.10 on Indigenous Peoples with human rights standards, especially those pertaining to indigenous peoples' territorial rights, participation rights, and right to be free from involuntary resettlement. The two issues are closely related as the general obligation of the Bank to account for and respect human rights applies also to its internal policies, at least those that may affect human rights. On the first issue, I conclude that the Bank does have obligations, derived from a variety of sources, to account for and respect human rights. On the second issue, I conclude, that these obligations have not been met with regard to OP 4.10 which is clearly substandard in human rights terms and fails to account for and respect indigenous peoples' rights binding on the Bank.

The juridical bases of the Bank's human rights obligations are far more complex than can be discussed here, and ultimately involve a series of difficult decisions about the relationship between and hierarchy among different norms and subject areas of international law. This said, it is safe to say that, as a subject of international law with rights, duties, and responsibility under that law, the Bank is required to respect and comply with the norms and principles that apply generally in the international legal system. These norms and principles include human rights characterized as peremptory norms, customary international law, and general principles of law. The Bank's obligations, given their source, are primarily to respect human rights. This is largely a negative duty requiring that the Bank account for and refrain from violating or acting inconsistently with human rights. While it is not precluded from setting higher standards, the Bank also has a neutral obligation to respect existing levels of protection accorded to human rights by international law. Failure to comply with this obligation triggers international responsibility.

The Bank is not a universe unto itself. It operates within the international legal system and, with the exception of those rights and duties by their nature inherently limited to states (e.g. rights and duties associated with territorial sovereignty), is required to conduct itself

in the manner prescribed by that system. It has been said that "violations of human rights offend the international legal order,"³⁶⁶ and that violations of the basic rights of human beings give rise to obligations *erga omnes*, obligations to the international community as a whole.³⁶⁷ One of the primary purposes and principles of the United Nations, reaffirmed numerous times, is promoting and encouraging respect for human rights. The Bank is a member of the U.N. family with duties in relation to the U.N. and its Charter and the human rights law that flows from the Charter. However, not only has the Bank never (at least publicly) acknowledged that it has obligations towards human rights, it repeatedly asserts that it is precluded from addressing—in Shihata's opinion, even discussing—many human rights by virtue of its Articles of Agreement. Yet, this Agreement is subject to international law and must be interpreted consistently therewith.

The Bank is also a forum for the collective action of its Members, each of whom have substantial obligations to respect, protect, and ensure human rights as defined by ratified conventions and general rules of international law. The Bank is obliged to respect and account for the obligations of its Members and to refrain from undermining their ability to faithfully comply with, or assisting in the violation of, those obligations. What this entails in practice is largely dependent upon the specific obligations of each member and how they are implicated in a given project or program. For the Bank, at the policy level, this obligation can in part be met by inclusion of a requirement that it will not finance activities that contravene its Members' international obligations, such as that found in the OPs on Environmental Assessment and Forests.

Collectively, and in the context of OP 4.10, the preceding requires that the OP be drafted and applied so as: not to violate existing levels of protection accorded to indigenous peoples' human rights; to be consistent with the Bank's obligations to respect human rights derived from customary international law, peremptory norms, and general principles of law, as well as the obligations the Bank has by virtue of the U.N. Charter and the human rights law that authoritatively interprets the Charter; and to account for and respect its Members'

366. MERON, *supra* note 151, at 192.

367. See Barcelona Traction, 1970 I.C.J. at 4 (explaining the nature of obligations *erga omnes*).

international human rights obligations. The same can also be said for OP 4.12 on Involuntary Resettlement, which is substantially at odds with international customary norms.

I will conclude by offering a few general thoughts on how the obligations of the Bank can be operationalized. Ideally, the Bank should adopt a general policy on human rights that will set out the framework for and prescribe specific measures for addressing human rights on an institutional and operational level.³⁶⁸ This policy should be developed and written with the participation and agreement of U.N. bodies charged with human rights matters and be, at a minimum, consistent with the Bank's obligations. Bodies charged with human rights matters should develop and write this policy with full participation and agreement and, at a minimum, be consistent with the Bank's obligations. An in-house unit with expertise in human rights will should also be established to provide preliminary screening of projects and programs. Also, Bank staff should receive human rights training.

The Bank should undertake further screening in cooperation with U.N. and other human rights bodies. Some degree of cooperation between U.N. human rights treaty bodies and the Specialized Agencies is provided for by the Covenant on Economic, Social and Cultural Rights,³⁶⁹ the Convention on the Rights of the Child,³⁷⁰ the Convention on the Elimination of Racial Discrimination,³⁷¹ and the Convention on the Elimination of All Forms of Discrimination Against Women.³⁷² Where not provided for, as in the case of the

368. See Bradlow, *supra* note 15, at 80-89 (discussing potential elements to be included in a general human rights policy that could be adopted by the Bank).

369. See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, arts. 18 and 22, 993 U.N.T.S. 3 (providing the Economic and Social Council the ability to cooperate with other U.N. organs and agencies for the purpose of implementing the Covenant).

370. See CRC, *supra* note 259, art. 45 (establishing guidelines for the Committee on the Rights of the Child for fostering the performance of the Convention).

371. See CERD, *supra* note 31, arts. 15(1), 16, 60 U.N.T.S. 195 (providing for cooperation among international instruments).

372. See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1981, art. 22, 1249 U.N.T.S. 13 (determining the framework for the Committee on the Elimination of Discrimination Against Women for working with the other agencies within the U.N.).

Covenant on Civil and Political Rights, the Economic and Social Council may coordinate cooperation pursuant to Article 63(2) of the U.N. Charter.³⁷³ This would also include cooperation with Charter-based bodies under ECOSOC such as the Commission on Human Rights and its Sub-Commission. In the case of indigenous peoples, specific cooperation agreements can be made with either or both the Permanent Forum on Indigenous Issues and the Sub-Commission's Working Group on Indigenous Populations.³⁷⁴ Regional human rights bodies can also play a valuable role in this respect.

The human rights obligations of the Bank apply to most levels of its activity, including Operational Policies; Bank programs, such as structural adjustment; country level strategies; specific projects; and compliance mechanisms, such as the Inspection Panel. If the Bank is to comply with its minimum obligation to respect human rights, a number of measures are required. One has already been mentioned: inclusion of language in Operational Policies prohibiting Bank-financing of activities that contravene its members' international human rights obligations.

Implementation of this language will require screening of projects against human rights criteria and an examination of country-specific obligations. Country-specific obligations can be built into and inform

373. See International Convention on Civil and Political Rights, Dec. 16, 1966, art. 63(2), 999 U.N.T.S. 171 (providing that ECOSOC "may coordinate the activities of the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations").

374. See *Resolutions and Decisions Adopted by the Economic and Social Council at its Substantive Session of 2000*, U.N. Economic and Social Council, at 52, U.N. Doc. E/2000/INF/2/Add.2 (2000). The resolutions and decisions established the Permanent Forum on Indigenous Issues through ECOSOC Resolution 2000/22, and providing that it:

[S]hall serve as an advisory body to the Council with a mandate to discuss the indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights; in so doing the Permanent Forum shall: (a) *Provide expert advice and recommendations on indigenous issues to the Council, as well as to programmes, funds and agencies of the United Nations, through the Council*; (b) Raise awareness and promote the integration and coordination of activities relating to indigenous issues within the United Nations system; (c) Prepare and disseminate information on indigenous issues.

Id. (emphasis added).

Country Assistance Strategies, which are country-specific plans negotiated between the Bank and Borrowers that set the broad parameters and priorities for Bank support, and which may reduce the burden of project-by-project evaluation. This can also be done for Structural Adjustment Programs. In both cases, the Bank and its Borrowers must incorporate specific, enforceable, and verifiable legal covenants into their and other agreements. The Bank will have to ensure that its projects and programs are in fact respectful of human rights. Given that the principle of free and informed consent is fundamental to indigenous peoples' rights, enforceable tripartite (Indigenous peoples, the Bank, and the Borrower) loan covenants also could be negotiated and incorporated by the Bank into agreements affecting indigenous peoples. Further, the Bank can screen Operational Policies to determine if they are consistent with its human rights obligations, which would provide an additional level of upfront screening for projects. Finally, the Bank could adopt a rights-based approach to development, specifically tying its projects to, and requiring that they meet and fulfill, international human rights standards.

Undoubtedly, the preceding will complicate the work of the Bank and will ultimately change the way in which it does business. However, the changes would not greatly differ from those associated with incorporating sustainable development, good governance, and other criteria into its work. Moreover, as presented here, this is not a matter of discretion for the Bank, but a matter of compliance with its international legal obligations. Surely the Bank is required to follow the same rule of law that it requires of its Borrowers.